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Forcings

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FORCINGS

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Eminent domain receives enormous amounts of scholarly and popular attention, and for good reason—it is a powerful form of government coercion that cuts to the heart of ownership. But a mirror-image form of government coercion has been almost entirely ignored: forced ownership, or "forcings." While legal compulsion to begin or continue ownership is neither entirely unstudied as an academic matter nor entirely unprecedented as a doctrinal matter, the category lacks a unified treatment. Because coercively imposed ownership can substitute for other forms of government coercion, forcings deserve attention, even if they will rarely dominate other alternatives. Attending to forcings as a conceptual possibility reveals their kinship with existing features of law and highlights one of ownership's most essential moves: delivering actual outcomes, and not just their expected value equivalents. Unpacking the considerations that might prompt law to impose ownership on unwilling parties points the way to alternatives short of full-strength compelled ownership. The analysis also suggests an additional domain of government action—"relievings"—for unburdening owners of unwanted property.

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INTRODUCTION

Takings, or involuntary terminations of ownership, have a widely ignored logical counterpart: involuntary impositions of ownership, or "forcings." Although legal doctrines of long standing sometimes compel people to own or to continue owning property,[1] the phenomenon of compelled ownership remains undertheorized. This Article takes on this neglected conceptual category. Attending to forcings generates important theoretical and policy payoffs, including the possibility that compelled ownership could substitute for or augment other forms of government coercion, such as eminent domain.

Consider blighted urban properties that have been vacated by defaulting owners and neglected by mortgagees. Cities like Richmond, California, have controversially pursued the possibility of using eminent domain to keep owners in possession.[2] But the ends of local governments facing the risk of foreclosure blight might also be achieved by requiring someone—perhaps the lender, perhaps a party developing an adjacent parcel—to step up to the plate of ownership when the owner in possession decamps. More broadly, some of the land assemblies currently pursued through eminent domain could instead be created by requiring existing owners to expand their holdings if they wish to stay in place. Forced ownership might also be used remedially, or as a form of prospective land use control, to compel owners to absorb responsibility for the areas that they impact.

The idea of pressing ownership on an unwilling party might seem like an obvious nonstarter for at least two reasons. First, one might think that an unwilling owner will necessarily be a low-valuing owner, and hence an objectively bad owner. If the point of property is to get resources into the hands of the highest-valuing user, forcings seem to push in exactly the wrong direction. Second, the interference with personal autonomy associated with forced ownership might seem so great as to make forcings a normatively toxic idea, as well as a political impossibil-

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1. See infra Part I.A (providing examples).

2. Richmond's plan, known as Community Action to Restore Equity and Stability (CARES), contemplates resort to eminent domain to acquire certain underwater loans for purposes of effecting principal reductions. See Frequently Asked Questions, Richmond CARES, http://www.richmondcares.com/content/faqs (on file with the *Columbia Law Review*) (last visited September 9, 2014) ("If the banks are unwilling to sell us the loans, then eminent domain will be considered."); see also Shaila Dewan, A City Invokes Seizure Laws to Save Homes, N.Y. Times (July 29, 2013), http://www.nytimes.com/2013/07/30/business/in-a-shift-eminent-domain-saves-homes.html (on file with the *Columbia Law Review*) (reporting on Richmond's plan). The plan quickly attracted controversy and spawned litigation. Appeals from a federal district court ruling that an investors' challenge to the plan was unripe have recently been dropped. See Sam Forgione, Investors Withdraw Appeals Against California Eminent Domain Plan, Reuters (May 16, 2014, 8:29 PM), http://www.reuters.com/article/2014/05/17/us-mortgages-investing-eminentdomain-idUSBREA4G00A20140517 (on file with the *Columbia Law Review*) (reporting that investor group expressed intent to refile appeal if Richmond went ahead with its plan).

ity. The reactions to the individual mandate in the Affordable Care Act (as well as to the more ominous prospect of forced broccoli purchases) suggest intense popular resistance to forced acquisition of unwanted things.[3]

These points are undermined by the fact that the law *already* compels ownership through a variety of means, from remedies for conversion and accession to limits on abandonment. Far from being alien or unprecedented, doctrines that produce and sustain unwanted ownership are threaded throughout the law.[4] Of course, ownership is rarely foisted on parties out of the blue; rather, it is bundled with some earlier act or omission—often, an earlier choice to undertake some form of voluntary ownership. These observations lead to two lines of inquiry that are pursued here. First, what considerations would prompt the law to impose *ownership*, as opposed to a monetary obligation, on an unwilling party? Second, what normative justifications and limits govern the bundling of ownership obligations with earlier choices?

Examining existing forms of unwanted ownership directs attention to one of property's most essential moves: providing a vehicle for delivering actual outcomes rather than their expected value equivalents. This core feature of the ownership strategy has implications for information costs, risk allocation, and incentive alignment. Social benefits thus may be uniquely achieved through ownership itself. Although these benefits can usually be realized by encouraging willing ownership, as through subsidies, such inducements may be insufficient where a given party occupies a monopoly position with respect to a strongly complementary resource or property interest.

The fact that forced ownership can advance social goals does not, of course, complete the case for it. As with takings, forcings can selectively impose burdens that should in fairness be spread across society.[5] And, as with takings, baseline questions quickly emerge when assessing the sorts of uncompensated burdens that individuals should be made to bear. That compensation could be used in tandem with forcings presents untapped possibilities even as it introduces questions about the adequacy

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3. See Transcript of Oral Argument at 13, Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012) (Nos. 11-393, 11-398, 11-400), 2012 WL 1017220, at *13 (statement of Scalia, J.) (asking whether reasoning supporting required purchase of health insurance would also justify forced purchase of broccoli); see also James B. Stewart, How Broccoli Landed on Supreme Court Menu, N.Y. Times (June 13, 2012), http://www.nytimes.com/2012/06/14/business/how-broccoli-became-a-symbol-in-the-health-care-debate.html (on file with the *Columbia Law Review*) (reporting on Justice Scalia's question and tracing roots of broccoli analogy).

4. See infra Part I.A (providing examples).

5. Cf. Armstrong v. United States, 364 U.S. 40, 49 (1960) ("The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.").

(and indeed commensurability) of compensation that mirror those found in the takings arena.

Recognizing the category of forcings also suggests an additional domain for governmental action, termed here "relievings." As the name suggests, a relieving involves the government removing burdensome and unwanted ownership from an erstwhile owner and either retaining ownership itself or imposing ownership on a third party. Those who find forcings to be normatively objectionable should be particularly interested in relievings, because the *failure* to engage in relieving often effectively produces a type of forcing—forced retention. Consider again defaulting mortgagors who have vacated the premises and wish to relinquish ownership, but cannot legally do so. The relevant policy question is not *whether* the government should force someone to own the property in question, but rather *whom* it shall force to take on that role.

The analysis here connects to several bodies of prior literature. Forced acquisition equates to the exercise of a put option, a move that has received attention in the literature on entitlement configuration.[6] The compelled continuation of ownership has been examined in the context of legal limits on abandonment[7] and destruction.[8] Weaker forms of pressure to begin or continue ownership can be found in many other legal features that have received academic treatment, from limits on free alienability to legal requirements that owners accept certain property bundles on an all-or-nothing basis.[9] Finally, forcings bear a family resem-

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6. The idea that the law chooses both how to allocate entitlements and how to protect them was famously developed in Guido Calabresi & A. Douglas Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 Harv. L. Rev. 1089 (1972). Subsequent work analogized certain ways of configuring entitlements to financial options. See Ian Ayres, Optional Law 14–17 (2005) (reviewing development of option analogy in legal scholarship). In finance, a call option gives the option holder the right but not the obligation to buy a stock at a specified price; a put option does the reverse by giving the option holder the right but not the obligation to sell a stock at a specified price. E.g., Richard A. Brealey et al., Principles of Corporate Finance 503–05 (10th ed. 2011). Translated into the realm of legal entitlements, a put option would be a property interest that one has the power to force another party to buy. See, e.g., Ayres, supra, at 15 ("[P]ut options give rise to 'forced purchases.'"); Madeline Morris, The Structure of Entitlements, 78 Cornell L. Rev. 822, 854 (1993) (describing put option as type of "Reverse Liability rule").

7. See generally Eduardo M. Peñalver, The Illusory Right to Abandon, 109 Mich. L. Rev. 191 (2010) [hereinafter Peñalver, Illusory Right] (exploring legal limits on abandonment); Lior Jacob Strahilevitz, The Right to Abandon, 158 U. Pa. L. Rev. 355 (2010) [hereinafter Strahilevitz, Right to Abandon] (examining common law prohibitions on abandoning real property in light of other facets of abandonment law).

8. See generally Lior Jacob Strahilevitz, The Right to Destroy, 114 Yale L.J. 781 (2005) (examining and critiquing limits on right to destroy).

9. See, e.g., Robert C. Ellickson, Property in Land, 102 Yale L.J. 1315, 1374 (1993) [hereinafter Ellickson, Property] (noting some legal rules "deter destructive decompositions of property interests"); Michael A. Heller, The Boundaries of Private Property, 108 Yale L.J. 1163, 1173–82 (1999) (examining legal rules limiting fragmentation of property); Frank I. Michelman, Ethics, Economics, and the Law of

blance to "givings," which have been previously analyzed as a counterpoint to takings.[10] This Article draws on these disparate strands to provide a unified treatment of a topic that has received surprisingly little attention: the use (and misuse) of governmentally compelled ownership of real and personal property.

The analysis proceeds in five Parts. Part I examines existing instances of unwanted ownership, broadly construed. Part II traces possible rationales for requiring parties to begin or continue ownership. Central to this discussion is an understanding of why ownership that is viewed as individually undesirable might nonetheless be viewed as socially desirable. Part III charts where forcings fit into a broader understanding of property ownership and state power. Part IV narrows the normatively plausible range of forced ownership by detailing how less coercive approaches (including ones that do not involve full-fledged possessory ownership) could achieve many of the goals of forced ownership. Part V then turns to the domains within which forcings (and relievings) appear to hold the most promise and examines doctrinal and theoretical issues surrounding their use.

Before beginning, a few words about scope are in order. This piece examines the compelled ownership of real property and, to a lesser extent, personal property. Although forcings involving services and benefits also present important issues,[11] this Article focuses on the way in which the ownership of physical things simultaneously empowers owners

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Property, *in* Ethics, Economics, and the Law: NOMOS XXIV 3, 15–16 (J. Roland Pennock & John W. Chapman eds., 1982) (discussing legal "restrictions on decomposition of titles"). See generally Lee Anne Fennell, Adjusting Alienability, 122 Harv. L. Rev. 1403 (2009) [hereinafter Fennell, Alienability] (exploring how alienability might be adjusted to address strategic behavior); Susan Rose-Ackerman, Inalienability and the Theory of Property Rights, 85 Colum. L. Rev. 931 (1985) (examining varieties of and rationales for inalienability).

10. Past work has emphasized that governmental actions confer benefits on some parties even as they impose burdens on others, and that givings as well as takings therefore deserve attention. See generally Windfalls for Wipeouts: Land Value Capture and Compensation (Donald G. Hagman & Dean J. Misczynski eds., 1978) [hereinafter Windfalls for Wipeouts] (collecting contributions on this topic); Abraham Bell & Gideon Parchomovsky, Givings, 111 Yale L.J. 547 (2001) [hereinafter Bell & Parchomovsky, Givings] (developing framework for "givings" mirroring that of "takings"). However, because this work has focused on recapturing windfalls through the imposition of monetary charges rather than the offloading of unwanted possessory interests, it has not fully engaged with the concept of "forcings" as developed here.

11. For example, restitution, although strictly limited in scope, can be understood within its operative domain as the forced purchase of benefits that have been conferred on unconsenting parties. See, e.g., Ariel Porat, Private Production of Public Goods: Liability for Unrequested Benefits, 108 Mich. L. Rev. 189, 195–98, 205–09 (2009) (discussing limits on restitution and proposing expansion of the doctrine). Insurance purchases are often compelled as well. Steven Plitt et al., 2 Couch on Insurance § 19:5 (3d ed. 2010) ("Most, if not all, jurisdictions have compulsory insurance laws which mandate that those engaged in particular activities have insurance."). More broadly, the government forces the purchase of various bundles of services through taxation.

to manage inputs and exposes them to the risk of actual outcomes.[12] Parts of the discussion will reach nonpossessory land use rights, but the analysis places primary emphasis on possessory interests in property, which generate outcomes over time.[13]

I. UNWANTED OWNERSHIP

The conceptual category of forcings has at its core ownership that is unwanted by the owner herself. This Part examines existing instances of unwanted ownership, broadly construed. To be sure, many of these examples do not readily lend themselves to the label of "forced ownership"; the unwanted ownership interest follows (or is even generated by) some voluntary choice. This overinclusion is intentional. The point is not that the law is rife with ownership that is compelled in a strong sense, but rather that unwanted ownership is accepted and even embraced in many legal contexts. Establishing this point sets the stage for Part II's inquiry into the purposes of ownership that is aversive (that is, unattractive or undesirable) to the owner herself.

Section A presents a number of examples organized around the two basic ways in which unwanted ownership arises—through unwanted acquisition and through unwanted retention. Section B lays out the reasons that ownership might be aversive. Section C distills lessons about the category of unwanted ownership and confronts a definitional puzzle about its boundaries.

A. *Existing Examples*

How might people end up in unwanted relationships with property? In a purely chronological sense, there are two possibilities: The person did not want to become an owner in the first place ("unwanted acquisition"), or she initially desired ownership but soured on it later ("unwanted retention").

1. *Unwanted Acquisition.* — Unwanted acquisition sometimes comes about through the direct imposition of a legal remedy, or through a contractual or statutory obligation that would enforce such a remedy. In other cases, an unsought (but unrebuffed or unrebuffable) transfer from another party or a natural event produces a legally enforceable ownership obligation. This section takes up these categories in turn.

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12. It is possible that some forms of intellectual property operate similarly, although this Article does not take up that question.

13. This emphasis on possessory rights distinguishes the analysis here from much of the previous literature on put options. Some prior work has noted that certain legal doctrines can force purchases of possessory interests. See, e.g., Ayres, supra note 6, at 27–28 (discussing examples of trover, mistaken improvement, and holdover tenancy). However, the analysis has focused primarily on private choices of whether to transfer land use rights. See, e.g., id. at 29–37 (examining potential role of put options in addressing nuisance claims).

a. *Remedial, Contractual, and Statutory Acquisition.* — Courts compel purchases remedially in a variety of circumstances. For example, courts may impose specific performance on an unwilling buyer in a contract to purchase land.[14] Similarly, at common law, tenants who held over beyond the end of their lease terms could be forced to purchase a new leasehold at the landlord's option.[15] Trover, the compelled purchase of chattel property, is a traditional remedy for the tort of conversion.[16] The shopkeeper's warning, "You Break It, You Buy It," may be understood as operating in the shadow of this remedial regime.

In other instances, courts may prescribe a purchase as one of two (or more) remedial alternatives. For example, a landowner who has suffered an encroachment by an innocent improver may be given a choice between forcing the encroacher to purchase the underlying land or purchasing the improvements herself.[17] A landowner who has actively

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14. Imposing specific performance of a real estate contract on an unwilling *seller* finds ready justification in the uniqueness of each parcel of real estate. But courts have been willing to turn the tables and make the buyer go through with the deal too. See, e.g., Humphries v. Ables, 789 N.E.2d 1025, 1035 (Ind. Ct. App. 2003) ("'The equitable doctrine is that the enforcement of contracts must be mutual, and, the vendee being entitled to specific performance, his vendor must likewise be permitted in equity to compel the acceptance of his deed and the payment of the stipulated consideration.'" (quoting Migatz v. Stieglitz, 77 N.E. 400, 401 (Ind. 1906))); Ash Park, LLC v. Alexander & Bishop, Ltd., 783 N.W.2d 294, 297 (Wis. 2010) (holding specific performance was available to sellers of real estate and declining to require finding of no adequate remedy at law); see also Jesse Dukeminier et al., Property 583 (7th ed. 2010) (noting "general practice" that both buyers and sellers can obtain specific performance of real estate contracts, but observing some recent departures from this rule—typically involving attempted enforcement by sellers).

15. See Ayres, supra note 6, at 28 ("The landlord could regain possession of her real property or force the holdover tenant (tenant at sufferance) to rent in the future—even if the tenant would prefer to just pay temporary damages and leave.").

16. See id. at 27 (noting plaintiff suffering conversion of property traditionally could choose between trover, which forces sale on converter, and replevin, which requires converter to return property along with damages); Richard A. Epstein & Catherine M. Sharkey, Cases and Materials on Torts 606 (10th ed. 2012) ("Originally, conversion posited a 'forced sale,' under which the defendant, as the owner of the plaintiff's property, was now made to buy it at the full market price—even if the defendant was willing to return it."); see also id. (noting modern softening of remedial rule and potential unavailability of forced sale where converted item is returned relatively undamaged).

17. Traditionally, encroached-upon owners could choose between injunctive relief (which might require the encroacher to tear down her structure) or damages. See Pile v. Pedrick, 31 A. 646, 647 (Pa. 1895) (offering this choice); Ayres, supra note 6, at 28 (observing damages option in *Pile* would have forced purchase of encroached-upon land). Alternatively, encroachers historically would simply lose their improvements to the owner of the underlying land—although this rule has been relaxed in modern times for good-faith improvers. See Dukeminier et al., supra note 14, at 141 (noting modern rule might, for instance, "forc[e] a conveyance (at market value) of land from the owner to the improver"); see also Hardy v. Borroughs, 232 N.W. 200, 201 (Mich. 1930) (holding if plaintiffs could establish case for equitable relief, "it w[ould] be proper to offer to defendants by decree the privilege of taking the improvements at the fair value found by the court, or to release to plaintiffs upon their paying the fair value of the lot found by the court"); Matteo Rizzolli, Building Encroachments, 5 Rev. L. & Econ. 661, 667–79 (2009)

encouraged a mistaken improvement may be treated more harshly; in at least one case, such an owner was effectively forced to purchase the house that had been built on his land.[18] Principles of accession may similarly require forced purchases where a party has improved raw materials to create a new product: Either the party who took the raw materials may be forced to purchase them, or the party who owned the raw materials may be required to purchase the improvements.[19]

The bounds of remedial ownership remain unclear, however, as a recent example illustrates. A couple in Upper Milford Township, Pennsylvania, sued their neighbor, a registered sex offender who had pleaded guilty to an indecent assault on their young daughter, in an effort to force him to purchase their home.[20] Predictably, the court declined to order the forced purchase.[21] But the idea of countering land

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(discussing and analyzing possible rules for addressing encroachments). Where a conveyance of the underlying land is forced, it potentially operates both as a forced sale (from the point of view of the landowner) and as a forced purchase (from the point of view of the encroacher)—although an innocent encroacher may welcome the opportunity to purchase the land at its fair market value, when this option is compared with other remedial alternatives.

18. Ollig v. Eagles, 78 N.W.2d 553, 560 (Mich. 1956) (granting lien upon landowner's property for "reasonable value of the improvements [plaintiff] made to this land" with offsets for contributions made by defendant and for "reasonable rental value of the unimproved land which [plaintiff] used for the years he occupied it"). A lien equal to the value of the improvements might also be ordered as an alternative even where both encroachee and encroacher acted in good faith. See Pull v. Barnes, 350 P.2d 828, 830 (Colo. 1960) (granting innocent improver right to remove cabin he had constructed, if feasible, or to place lien on land equal to cabin's value).

19. The general rule is that the owner of "the larger or more valuable input" gets to keep the thing in question. Thomas W. Merrill, Accession and Original Ownership, 1 J. Legal Analysis 459, 466 (2009) [hereinafter Merrill, Accession]. Various rules determine the compensation, if any, due to the other party, but one possible outcome is a forced purchase of the other party's input. See, e.g., Yun-chien Chang, An Economic and Comparative Analysis of *Specificatio* (The Accession Doctrine), 38 Eur. J.L. & Econ. (forthcoming 2015) (manuscript at 14), available at http://link.springer.com/content/pdf/10.1007%2Fs10657-014-9453-0.pdf (on file with the *Columbia Law Review*) (describing compensation rule in which improver of raw materials can force original owner to pay for improvements as "type of put-option rule"). Such a forced purchase may be accomplished by placing a lien on the property that contains the mistakenly appropriated input. See, e.g., Richard A. Epstein, Protecting Property Rights with Legal Remedies: A Common Sense Reply to Professor Ayres, 32 Val. U. L. Rev. 833, 851 (1998) [hereinafter Epstein, Protecting Property] (discussing this remedy for accession).

20. Patrick Lester, Family Sues to Force Sex Offender to Buy Their Home, Morning Call (Mar. 16, 2013), http://articles.mcall.com/2013-03-16/news/mc-upper-milford-sex-offender-suit-20130316_1_damages-allentown-attorney-lawsuit [hereinafter Lester, Family Sues] (on file with the *Columbia Law Review*). The man had returned to the neighborhood after serving time in prison for the assault. The couple claimed that the house had lost value as a result of his presence and that they felt under great pressure to move. Id.

21. C.Y. v. Beck, No. 2012-C-5388, slip op. at 2 n.5 (Pa. Ct. Com. Pl. May 9, 2013) (order on preliminary objections) ("This Court finds it against public policy to require a defendant to purchase a plaintiff's property in a nuisance case as it would open the proverbial floodgates."); see Patrick Lester, Judge: Sex Offender Not Required to Buy

use conflicts with purchase demands is not unprecedented. Conditional variances in New Jersey offer neighboring landowners a choice between suffering the grant of the variance or making a binding offer to purchase the property for which the offending variance has been sought.[22] Landowners were empowered to put the government to a similarly structured choice—stop regulating or buy the property—under the Columbia River Gorge National Scenic Area Act prior to its 2000 amendment.[23]

Sometimes the law will force a swap of property for property, effectively compelling both a sale and a purchase. For example, judicial partition in kind simultaneously dispossesses the erstwhile cotenant of a fractional undivided share in the whole property while forcibly conveying a full ownership interest in a portion of the property.[24] Land readjust-

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Victim's Property, Morning Call (May 14, 2013), http://articles.mcall.com/2013-05-14/news/mc-upper-milford-oliver-beck-sex-offender-lawsuit–20130514_1_property-rights-oliver-larry-beck-varricchio (on file with the *Columbia Law Review*) (reporting on court's order on preliminary objections). This was not a surprising result; law professors contacted by the press when the case was pending saw little chance that the court would grant the requested relief. See, e.g., Lester, Family Sues, supra note 20 (quoting Professor Douglas Laycock for view that forced home purchase might be part of settlement but "would be odd as a court-ordered remedy").

22. A variance is a land use flexibility device that enables a landowner to do something with or on her land that would otherwise be prohibited by the applicable zoning ordinance. See, e.g., Stewart E. Sterk & Eduardo M. Peñalver, Land Use Regulation 22–23 (2011) (describing variances). New Jersey's conditional-variance approach requires neighbors who wish to block an otherwise appropriate variance to back up their opposition with an offer to purchase the property if the variance is denied. See, e.g., Nash v. Bd. of Adjustment, 474 A.2d 241, 245–46 (N.J. 1984) (explaining conditional variances and holding neighbor must offer "fair market value of the property assuming that all necessary variances have been granted"). If such an offer is made, the owners of the property have the choice to sell at that price or keep the property without the variance. Id. at 245. Thus, landowners who otherwise meet the criteria for a variance will receive either a variance or a put option with a strike price equal to the fair market value of the property with the variance.

23. Michael C. Blumm & Joshua D. Smith, Protecting the Columbia River Gorge: A Twenty-Year Experiment in Land-Use Federalism, 21 J. Land Use & Envtl. L. 201, 218–19 (2006) (examining "opt-out" provision for Special Management Areas, which required government to either accept landowner's bona fide offer to sell property at fair market value or release landowner from regulations). Similarly, when a landowner succeeds on an inverse condemnation suit, the government may choose whether to pay for the property it has taken or withdraw its regulation. If a taking is found, however, a governmental entity that chooses to discontinue regulating must nonetheless pay for the time slice that it has taken in the interim. See First English Evangelical Lutheran Church v. Cnty. of L.A., 482 U.S. 304, 321 (1987) ("[W]here the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.").

24. See Yun-chien Chang & Lee Anne Fennell, Partition and Revelation, 81 U. Chi. L. Rev. 27, 33 (2014) (explaining judicial partition causes "[o]ne or more of the co-owners [to] be coercively dispossessed of her undivided fractional share in the property and given either land or money instead"). Where the partition is in kind, the cotenants receive their shares in the form of land. See id. at 27. Judicial partition operates coercively because it can be unilaterally sought over the objections of other cotenants. Id. at 27–28.

ment schemes operate similarly to deliver new land in place of old.[25] In these examples, an owner may primarily object to the initial deprivation, for which she does not feel the in-kind payment adequately compensates, rather than to the new grant of ownership.[26] Nonetheless, forced compensation in kind via ownership may be objectionable in its own right, if only for the costs involved in liquidating or otherwise disposing of the interest.

Contractual or statutory provisions may require a party to buy property (or buy it back) if certain conditions occur.[27] Recent examples include "put-backs" of bad housing loans[28] and efforts to make mortgagees foreclose on properties that have been vacated by defaulting borrowers.[29] Consider also provisions that turn library book borrowers or

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25. Land readjustment is not well known in the United States but is used in a number of other countries. E.g., Daphna Lewinsohn-Zamir, Can't Buy Me Love: Monetary Versus In-Kind Remedies, 2013 U. Ill. L. Rev. 151, 188 & n.177. It provides a potential substitute for eminent domain. See id. at 188 (describing land readjustment and comparing it with eminent domain). Although specifics vary, the basic idea is to reconfigure a development area while returning a portion of it to the original landowners—either in the form of land within the development area that is at least as valuable as that which was taken away, or in the form of shares in the redevelopment project. See Yu-Hung Hong, Assembling Land for Urban Development: Issues and Opportunities, *in* Analyzing Land Readjustment: Economics, Law, and Collective Action 3, 23–24 (Yu-Hung Hong & Barrie Needham eds., 2007) (describing reallocation methods). For work discussing existing and proposed land readjustment approaches, see generally Analyzing Land Readjustment, supra; George W. Liebmann, Land Readjustment for America: A Proposal for a Statute, 32 Urb. Law. 1 (2000).

26. For example, a cotenant might prefer shared access to the entire parcel—or rights to a share of the proceeds it could bring upon sale—to the subset of the land she receives in a judicial-partition action.

27. These requirements effectively grant put options, which may be explicit or embedded in contractual or legal arrangements. See, e.g., Ayres, supra note 6, at 3–4 (explaining how rent-to-own arrangements embed put options, which consumers can exercise by returning rented items); George S. Geis, An Embedded Options Theory of Indefinite Contracts, 90 Minn. L. Rev. 1664, 1687–89 (2006) (describing and illustrating embedded options).

28. Banks that sell loans to Fannie Mae and Freddie Mac must certify compliance with certain underwriting standards and can be forced to repurchase the loans after the borrower defaults if those requirements were not met. Clea Benson, Fannie-Freddie Overseer Easing Loan Buybacks: Mortgages, Bloomberg (May 13, 2014), http://www.bloomberg.com/news/print/2014-05-13/fannie-freddie-overseer-easing-loan-buybacks-mortgages.html (on file with the *Columbia Law Review*) (describing these loan "buybacks" or "putbacks" and reporting on new standards governing them).

29. See, e.g., Mhari Saito, Banks Refusing to Take Back Foreclosed Properties, NPR (Mar. 3, 2009, 2:31 PM), http://www.npr.org/templates/story/story.php?storyId=101386052 (on file with the *Columbia Law Review*) (discussing possibility of legislation "that would force lenders to completely follow through with foreclosure or forgive the homeowner's debt"). Mortgages in nonrecourse jurisdictions have sometimes been viewed as granting a put option to sell one's home back to the mortgagee at the price of the outstanding loan balance. See, e.g., Todd J. Zywicki & Joseph D. Adamson, The Law and Economics of Subprime Lending, 80 U. Colo. L. Rev. 1, 26–27 (2009) (describing "option

video renters into owners (with payment obligations) if they fail to return an item for a specified period of time,[30] and policies or laws that allow retail products to be returned after their purchase, effectively forcing their repurchase.[31]

b. *Unrebuffed and Unrebuffable Transfers.* — Some unwanted acquisitions arise through transfers from other parties that were not rebuffed in time, or perhaps could not have been successfully rebuffed at all. Gifts require acceptance by the donee, but as long as the property is valuable, acceptance may be readily inferred.[32] Factual disputes surrounding acceptance may erupt if ownership turns out to be a losing proposition, as where the owner is liable for significant environmental cleanup.[33] Similarly, it is generally the case today that bequests and intestate inheritances can be disclaimed, as long as this is done within a specified time frame.[34] Because refusing gifted or inherited property will often come at

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model" of foreclosure). The characterization is imperfect, however, to the extent that mortgagees can refuse to foreclose.

30. See, e.g., Redbox Rental Terms and Conditions, Redbox (June 2, 2014), http://www.redbox.com/rentalterms (on file with the *Columbia Law Review*) ("If you keep an item through the maximum rental period, that item is yours to keep and Redbox will charge you the maximum charge for that item.").

31. For instance, "lemon laws" may require automakers to buy back a car with serious defects that cannot be repaired after a number of attempts. See, e.g., Lemon Law, Ill. Att'y Gen., http://www.illinoisattorneygeneral.gov/consumers/lemonlaw.html (on file with the *Columbia Law Review*) (last visited September 9, 2014) (describing consumer protections provided by Illinois Lemon Law, including potential remedy in which "manufacturer will buy your vehicle back from you, less the value for miles driven"). A return policy, which effectively grants the buyer a put option to sell back the purchased goods for a refund, is a common voluntary feature in retail sales. Hyundai offered an interesting version of this option from early 2009 to early 2011. See Peter Valdes-Dapena, Hyundai Won't Buy Your Car Back Anymore, CNNMoney (Mar. 30, 2011, 12:52 PM), http://money.cnn.com/2011/03/30/autos/hyundai_job_loss_buy_back/ (on file with the *Columbia Law Review*) (describing discontinued program, in which car buyers who lost their jobs within one year of buying a Hyundai could sell it back, with Hyundai covering any difference between outstanding loan balance on car and car's trade-in value).

32. See, e.g., Gruen v. Gruen, 496 N.E.2d 869, 874–75 (N.Y. 1986) ("Acceptance by the donee is essential to the validity of an inter vivos gift, but when a gift is of value to the donee, as it is here, the law will presume an acceptance on his part.").

33. For example, acceptance was disputed in a case involving a dam site that turned out to require $40,000 in repairs mandated by the New York State Department of Environmental Conservation. See Janian v. Barnes, 727 N.Y.S.2d 182, 184–85 (App. Div. 2001) (finding defendant had not expressly rejected quitclaim deed and was therefore sole owner of dam, barring some other defense to transfer); see also Janian v. Barnes, 742 N.Y.S.2d 445, 447–48 (App. Div. 2002) (noting "$40,000 lien imposed by [Department of Environmental Conservation] to secure the cost of repairing the dam" and finding it to have been imposed after deed was delivered).

34. See, e.g., Jesse Dukeminier & Robert H. Sitkoff, Wills, Trusts, and Estates 140 (9th ed. 2013) (explaining intestate inheritance could not be avoided at common law, but state statutes now permit heirs as well as beneficiaries under wills to disclaim inheritances); id. at 141 (discussing time limits for disclaiming inheritances). However, in a minority of states insolvent heirs and beneficiaries are precluded from disclaiming inheritances. See id. at 142 (noting circumstances in which courts will find disclaimer ineffective to avoid

some positive cost,[35] however, unrebuffed transfers can produce unwanted ownership.

Chattel property that has been dumped on one's land without permission presents a kind of transfer that may be especially hard to rebuff.[36] Even though the initial dumping constitutes a trespass,[37] once the goods (or bads) are in place, they become the problem of the owner of the premises as a practical matter. The theoretical ability to bring an action against the party who abandoned the chattels[38] will not translate into a meaningful practical opportunity to force the removal of the goods if there is no way to learn the party's identity or whereabouts. Self-help may be employed to eject the offending item but only to the extent that one can do so without trespassing on the property of someone else. Self-help may also be used to keep such offending objects away in the first place (through the use of high fences, posted guards, and so on) but at some positive cost.

c. *Natural Occurrences.* — Natural occurrences can also produce ownership relationships without any input on the part of the owner. The principle of accession operates in a number of contexts to assign new interests to holders of related interests.[39] Thus, under the doctrine of ratione soli, wild animals killed or captured on the land of the owner become the landowner's property.[40] Accretion can deliver new increments of real estate to riparian owners.[41] And the doctrine of increase gives ownership of newborn animals to the owner of the animal's

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creditors); see also Adam J. Hirsch, The Problem of the Insolvent Heir, 74 Cornell L. Rev. 587, 592–601 (1989) (examining legal developments relating to disclaimers by insolvent heirs).

35. Taking action to reject an unsought transfer always requires some amount of effort, and there may be social as well as purely administrative impediments. See, e.g., Strahilevitz, Right to Abandon, supra note 7, at 365 (discussing gifts "recipient felt duty-bound to keep and maintain . . . out of affection for the donor").

36. A related situation involves the purchase of real estate that contains unwanted chattel property. See infra notes 78–79 and accompanying text (providing examples).

37. See, e.g., Restatement (Second) of Torts § 158 (1965) ("One is subject to liability to another for trespass . . . if he intentionally . . . enters land in the possession of the other, or causes a thing or third person to do so . . . .").

38. See, e.g., id. § 158(c) (stating trespass liability attaches to one who intentionally "fails to remove from the land a thing which he is under a duty to remove").

39. See Merrill, Accession, supra note 19, at 462–74 (providing overview of principle of accession in Anglo American law).

40. As Thomas Merrill explains, ratione soli is a competing principle to first possession that was historically more dominant in England than in the United States. Id. at 470. The difference matters only to the extent that private unenclosed lands are open to hunters, since exclusion rights would ensure that only the landowner (or those granted permission by her) could capture or kill animals on the land. Id. Moreover, it would seem that even a first-possession rule would permit a hunter to abandon a captured or killed animal, making it the property of the landowner.

41. Id. at 465–66.

mother.[42] These unsought acquisitions may often be welcome, but they could easily be aversive for particular owners. The potential burdens associated with such rules push questions about the termination of ownership to the forefront. In a 1909 case, for example, the Georgia Court of Appeals alluded to the law of increase in concluding that humane destruction of a "worthless" dog must be permitted.[43]

2. *Unwanted Retention.* — Owners may find themselves holding or using property beyond the point where it generates positive returns and even after it begins to impose a burden. Two facets of unwanted retention are considered below: limits on terminating possession and limits on terminating use.

a. *Limits on Terminating Possession.* — Recent scholarship has explored the limits on owners' ability to unilaterally end their possessory relationship with property through abandonment or destruction.[44] Restrictions on alienability can also make getting rid of property more costly or difficult,[45] as can features of the property itself that render it less marketable.[46] These limits are important to the category of unwanted ownership in two ways. First, even ownership that is initially fully voluntary can become aversive over time, making blocked channels for ending the relationship significant on their own in generating unwanted ownership.[47] Second, the categories of unwanted acquisition discussed above would have little bite were it not for blockades to disposing of property cheaply thereafter.[48]

The general common law rule that fee interests in real estate cannot be abandoned[49] has significant implications, as the recent housing crisis

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42. Id. at 464.

43. Miller v. State, 63 S.E. 571, 573 (Ga. Ct. App. 1909) (observing that without the ability to destroy one's own dog "one who found himself possessed of a worthless cur bitch would be obliged to care for and support not only her, but also the 'heirs of her body' and all her 'lineal descendants'").

44. See supra notes 7–8.

45. See, e.g., Rose-Ackerman, supra note 9, at 933–61 (examining types of alienability limits and their effects).

46. See, e.g., Fennell, Alienability, supra note 9, at 1427–28 & n.118 (distinguishing legal restrictions on alienability from marketability constraints, and discussing related literature). Ownership that is hard to end due to lack of marketability or other nonlegal barriers is sometimes described as "forced." See, e.g., Bernard Benjamin Hoffman, Jr., Forced Home Ownership 1 n.2 (1967) (unpublished dissertation, Syracuse University) (on file with the *Columbia Law Review*) (defining situation in which homeowners wish to leave their present home but cannot do so for economic reasons as "forced ownership").

47. For example, real estate acquired voluntarily may become unaffordable to maintain; a puppy acquired voluntarily may grow into a rambunctious adolescent dog one does not have time or space to care for.

48. For example, unwanted chattels dumped on one's land or the unwanted offspring of one's animals would be no bother if they could be costlessly transferred out of one's ownership and possession.

49. See Strahilevitz, Right to Abandon, supra note 7, at 355, 359–60, 399–402 (discussing this principle).

has shown. In the absence of any mechanism to force lenders to foreclose when mortgagors vacate the premises and cease paying,[50] defaulting mortgagors may be forced to retain ownership and the obligations that follow from it—including liability for homeowner association dues.[51] A selling of the property is often blocked by the fact that the mortgage balance far exceeds the likely sale price.[52] The inability of the homeowner to come up with the difference locks her into ownership, unless the lender agrees to a short sale, accepts a deed in lieu of foreclosure, or forecloses on the property—and it may choose to do none of these.[53]

The ability to abandon chattel property is often also severely constrained. Specific provisions restrict the ability to abandon certain kinds of chattel property, such as automobiles[54] and animals.[55] More broadly, laws prohibit people from discarding chattels on the property of others

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50. See Saito, supra note 29 (noting problem of lenders refusing to foreclose); see also John Gittelsohn, Homeowner Associations in Need of Cash Sue to Force Foreclosures, Bloomberg (Aug. 23, 2011, 12:01 AM), http://www.bloomberg.com/news/2011-08-24/homeowner-associations-in-need-of-cash-sue-lenders-to-force-foreclosures.html (on file with the *Columbia Law Review*) (discussing "mortgage terminator" lawsuits brought by homeowner associations against homeowners and lenders to collect unpaid association dues).

51. Homeowner association dues were at issue in Pocono Springs Civic Ass'n v. MacKenzie, 667 A.2d 233 (Pa. Super. Ct. 1995), a leading case holding that there is no right to abandon fee interests in real property. Id. at 235–36.

52. See, e.g., Lisa Gibbs, Why Underwater Homeowners Are a First-Time Buyer's Enemy No. 1, Money (June 1, 2014), http://time.com/money/2791601/why-underwater-homeowners-are-a-first-time-buyers-enemy-1/ (on file with the *Columbia Law Review*) (observing that homeowners who will not receive sufficient sales proceeds to cover their outstanding mortgage debt, commissions, and closing costs will be unable to sell if they lack cash to cover the difference).

53. See, e.g., In re Cormier, 434 B.R. 222, 233 (Bankr. D. Mass. 2010) (finding "no authority under Massachusetts law or the Bankruptcy Code to compel [mortgagee] to take immediate title to or possession of the Property"). But see In re Pigg, 453 B.R. 728 (Bankr. M.D. Tenn. 2011) (ordering sale of home where debtor had surrendered property but was locked into ownership and liable for accruing homeowner association dues because her mortgagee refused to foreclose or accept deed in lieu of foreclosure). Land banks offer a possible way out of the conundrum by offering lenders a low-cost way to dispose of the property, but may carry some drawbacks as well. See, e.g., U.S. Gov't Accountability Office, GAO-11-93, Mortgage Foreclosures: Additional Mortgage Servicer Actions Could Help Reduce the Frequency and Impact of Abandoned Foreclosures 59–61 (2010), available at http://www.gao.gov/new.items/d1193.pdf (on file with the *Columbia Law Review*) (assessing land banks as possible response to abandoned foreclosures).

54. See, e.g., Conn. Gen. Stat. Ann. § 14-150(a) (West Supp. 2014) (making it illegal to leave motor vehicle on highway or another person's property for more than twenty-four hours).

55. Animal protection laws vary considerably from jurisdiction to jurisdiction. See, e.g., Animal Protection Laws of the United States and Canada, Animal Legal Def. Fund, http://aldf.org/resources/advocating-for-animals/animal-protection-laws-of-the-united-states-of-america-and-canada/ (on file with the *Columbia Law Review*) (last visited September 9, 2014) (offering one compilation).

without permission.[56] Bans on littering provide simple examples. Although these prohibitions are usually enforced with fines rather than by forcing the owner to continue in possession,[57] an interesting example of the latter approach can be found in one Spanish town's tactic to address pet waste: mailing dog feces back to the errant owners.[58]

b. *Limits on Terminating Use.* — Closely related to the unwanted retention of property is the forced continuation of the property's current use. For example, rent control laws may effectively require that the property continue in rental use, especially if coupled with other limitations that preclude repossessing the property for personal use, converting it to any other use, or destroying it.[59] Historic preservation ordinances that prohibit the destruction of improvements on property present a similar scenario.[60] Here, keeping the underlying parcel requires keeping the structure as well. While the entire property may be sold, the requirement that the use remain unchanged and that the new owner engage in upkeep of the property limits its marketability.

Land use exactions and "in lieu of" fees may similarly pressure the continuation of existing uses. The California case of *Ehrlich v. City of Culver City* offers an interesting example.[61] There, the landowner had

56. See Peñalver, Illusory Right, supra note 7, at 203–07 (explaining abandonment is only possible on someone else's land, given inability to abandon land itself—yet no one else's land can be legally used for this purpose without owner's implicit or explicit consent).

57. See Strahilevitz, Right to Abandon, supra note 7, at 363–64 & n.22 (discussing state and local bans on littering and dumping waste, and citing examples of statutory provisions).

58. See Suzanne Daley, Special Delivery, of Sorts, for Wayward Dog Owners, N.Y. Times (Aug. 6, 2013), http://www.nytimes.com/2013/08/07/world/europe/a-special-delivery-of-sorts-to-warn-dog-owners-in-spain.html (on file with the *Columbia Law Review*) (reporting on this enforcement campaign).

59. Such a situation was described in the petition for writ of certiorari in *Harmon v. Kimmel*, a case that involved New York's rent stabilization laws. Petition for a Writ of Certiorari at 32–35, Harmon v. Kimmel, 132 S. Ct. 1991 (2012) (No. 11-496), 2011 WL 5040042, at *32–*35. The Harmons alleged that the laws worked a taking when applied to property that was zoned only for residential use, was landmarked and hence could not be destroyed, and could not be reclaimed for family use unless a suitable alternative rental was provided to the tenants. Id. The Second Circuit had rejected the takings claim in Harmon v. Markus, 412 F. App'x 420, 422 (2d Cir. 2011), and the Supreme Court denied certiorari, *Kimmel*, 132 S. Ct. at 1991.

60. See, e.g., Maher v. City of New Orleans, 516 F.2d 1051, 1054, 1067 (5th Cir. 1975) (upholding prohibition on destruction of cottage adjacent to landowner's home in historic French Quarter pursuant to ordinance designed to preserve "tout ensemble" of Quarter); Carol M. Rose, Preservation and Community: New Directions in the Law of Historic Preservation, 33 Stan. L. Rev. 473, 507–08 (1981) (discussing *Maher*); Caroline Connors, Controversy Clouds Future of House in Landmark District, Beverly Rev. (Aug. 5, 2014, 12:50 PM), http://www.beverlyreview.net/news/top_story/article_f022b8dc-1cc8-11e4-a7af-0017a43b2370.html (on file with the *Columbia Law Review*) (discussing Chicago landmark-district house that owners may be prohibited from destroying despite reported mold infestation).

61. 911 P.2d 429 (Cal. 1996).

closed his unprofitable tennis club after a string of financial losses and sought approval for a new use.[62] The city conditioned approval on (among other things) the owner mitigating the loss of recreational opportunities in the community by constructing four new municipal tennis courts or paying a $280,000 fee.[63] Although the court remanded for consideration of whether the fee was proportionate under the standard articulated in *Dolan v. City of Tigard*,[64] it indicated that the withdrawal of recreational uses could impose public costs for which *some* impact fee might be appropriate.[65]

"Use it or lose it" requirements similarly constrain owners by mandating the active exercise of certain prerogatives of ownership.[66] These requirements can be understood as limiting the (temporary) disposition of property[67] and may thereby produce a type of unwanted ownership. Adverse possession imposes a similar, if weaker, requirement that ownership be accompanied by acts characteristic of ownership (use or monitoring), if one does not wish to risk dispossession.[68] Here, it is worth flagging an important conceptual point to be revisited below:[69] Casting the notion of aversive ownership broadly enough to encompass unwanted *aspects* of

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62. Id. at 434.

63. Id. at 434–35.

64. Id. at 448–50 (discussing standard of "rough proportionality" established by Supreme Court in Dolan v. City of Tigard, 512 U.S. 374 (1994), and remanding case for further consideration under it).

65. Id. at 446 ("In short, it is well accepted in both the case and statutory law that the discontinuance of a private land use can have a significant impact justifying a monetary exaction to alleviate it.").

66. See, e.g., Daphna Lewinsohn-Zamir, More Is Not Always Better than Less: An Exploration in Property Law, 92 Minn. L. Rev. 634, 650–60, 681–83 (2008) (discussing "use it or lose it" provisions). Weaker penalties or subsidies might also be designed to pressure property use. Recent examples include bills introduced by Philadelphia City Council President Darrell L. Clarke to address neglected properties. See Troy Graham, Clarke Plans Bill on Vacant Properties, Philly.com (June 8, 2013), http://articles.philly.com/2013-06-08/news/39817627_1_vacant-properties-clarke-wall-collapse (on file with the *Columbia Law Review*) (describing bill to impose "non-utilization tax" of "10 percent of a property's assessed value after it had been vacant for more than a year," with increased taxes kicking in for additional years of vacancy); Jan Ransom, Council Bills Aim to Make Vacant, Tax-Delinquent Properties Profitable, Philly.com (Mar. 8, 2013), http://articles.philly.com/2013-03-08/news/37535440_1_tax-delinquent-properties-vacant-properties-actual-value-initiative (on file with the *Columbia Law Review*) (describing mortgage-forgiveness bill for residents below certain income level "who build housing [and] live on the property for five years").

67. See J.E. Penner, The Idea of Property in Law 79 (1997) ("[T]he lesser decision to forego using [property] for a day or a month or a year . . . is as much a disposition of the property as is its total abandonment.").

68. See, e.g., Thomas W. Merrill, Property Rules, Liability Rules, and Adverse Possession, 79 Nw. U. L. Rev. 1122, 1130 (1985) (noting true owner need only "periodically . . . assert his right to exclude others" to preserve his rights against potential adverse possessor).

69. Infra Part I.C.

ownership or unwanted duties attending to ownership makes the principle difficult to bound or to distinguish from ownership more generally.

B. *Reasons for Aversion*

Why might parties wish to avoid ownership? There are several possibilities. First, ownership might be unwanted because it comes with a price tag—a *payment obligation* that exceeds what the property is worth to the owner. Often, the owned item would be desirable if it could be obtained for free, but not if it must be paid for at the specified rate. This is usually the case when a put option is exercised to force a purchase.[70] The circumstances that cause the option to be "in the money" for the option holder will typically also make the forced purchase a bad deal for the party against whom the option is exercised. What is aversive is the price, not the good. Similarly, many remedial applications of forced ownership—such as being required to pay for land upon which one has innocently encroached—would not be aversive (nor remedial) if the transfer were completed for free.

Second, ownership might be unwanted because it comes with *liability exposure*. Expected liability might outstrip the expected benefits that will flow from ownership, or exposure might simply present an unacceptable level of risk to the owner (even though ownership would on the whole carry positive expected value).[71] It is most natural to think of this exposure in terms of liability to third parties—whether governmental entities that impose taxes or environmental cleanup obligations, collectives that demand homeowner association fees, or individuals who suffer harms while on one's premises. But ownership may also expose the owner herself to uncompensated harms.[72] These harms may range from small, certain, and chronic (the abiding ugliness of an unwanted gift[73] or the constant upkeep requirements of a suboptimally large lawn) to large, uncertain, and acute (the chance of fatal exposure to dangerous property conditions).

Third, ownership might be unwanted because it will require *costly transfer or disposal efforts* that exceed any value that the owner can realize as a result.[74] Some motivation must still be posited for the aversion to the

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70. See supra note 6 (defining put options).

71. The latter situation will be most likely where robust insurance markets do not exist for the risks in question. See generally Kenneth J. Arrow, Insurance, Risk and Resource Allocation, *in* Essays in the Theory of Risk-Bearing 134 (1971) (analyzing incompleteness in insurance markets).

72. See Guido Calabresi, The Costs of Accidents 167 n.26 (1970) (using concept of liability broadly to capture impacts left to fall on victims of accidents).

73. See Strahilevitz, Right to Abandon, supra note 7, at 365 (describing "tyrannical heirlooms").

74. Even where the owner expects to realize positive value from the disposition of the property, the ownership may still be unwanted relative to a monetary award to which one might otherwise be entitled and which one might prefer. Here, the cost of disposal or

property itself, however, to explain the desire to transfer or dispose of it. Often the notion of liability exposure, broadly construed, will provide the answer. Ownership carries an opportunity cost; it demands time, space, attention, and effort that the owner might prefer to use in another way. In some instances, a payment obligation associated with the forced purchase generates pressure to liquidate, either because that obligation has caused a financial shortfall, or because the owner does not want to bear the investment risk associated with holding onto the property.

Finally, ownership might be aversive for reasons relating to *autonomy or personhood*. The things that one owns are in some sense an extension of the self and constitutive of one's identity.[75] Just as having personally significant property wrested away can interfere with a person's self-definition, so too can having unwanted things thrust upon her.[76] Liability exposure is one reason that people might not wish to be personally associated with things. But the objection to ownership may go deeper, given the potential for people to identify with the things they own and hence with the harms that they inflict.[77] Property holdings can also clash with one's sense of self. Consider, for example, a property owner in the American South who discovers upon clearing her rural tract that it contains an abandoned bus from the mid-twentieth century marked with segregated seating instructions.[78] This difficult-to-remove bus may become a source of shame to the landowner who wants no association with its racist message. Indeed, the effects of repugnant things may linger even after they are physically removed.[79]

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transfer represents the cost of transforming the less preferred in-kind item into the preferred currency of cash.

75. See generally Meir Dan-Cohen, The Value of Ownership, 9 J. Pol. Phil. 404 (2001) (examining connections between ownership and identity).

76. See, e.g., Penner, supra note 67, at 79 ("One ought not to be saddled with a relationship to a thing that one does not want . . . ."); Bell & Parchomovsky, Givings, supra note 10, at 602 (noting interference with autonomy inherent in forced purchases).

77. Meir Dan-Cohen illustrates this point using an example in which a person whose vase blows out a window and injures a passerby feels a sense of responsibility for the event, even though she was not at fault. Meir Dan-Cohen, Responsibility and the Boundaries of the Self, 105 Harv. L. Rev. 959, 979–81 (1992).

78. See Jodi A. Barnes & Carl Steen, Archaeology and Heritage of the Gullah People: A Call to Action, 1 J. Afr. Diaspora Archaeology & Heritage 167, 201 fig.11 (2012) (including photograph showing segregated seating notice inside bus abandoned on rural property near Edgefield, South Carolina).

79. A powerful example is related in Paul Auster's memoir. He describes moving into a house and discovering some boxes of books that had been left behind by the previous owners. Paul Auster, Winter Journal 90 (2012). To his disgust, he finds that the collection includes pro-Nazi tracts and a volume defending anti-Semitism. Id. at 90–91. He hauls the books to the town dump, but their taint remains, ultimately forcing him to move out. As he explains, addressing his former self: "It wasn't possible to live in a house with such books in it . . . . [B]ut even after you got rid of the books, it still wasn't possible to live there. You tried, but it simply wasn't possible." Id. at 91.

C. *Taking Stock*

This brief tour of existing forms of unwanted ownership has established that the phenomenon exists: Sometimes people do not want the things they own. Their reasons may be idiosyncratic or personal and will not necessarily track the asset's market value.[80] The discussion above has also established that the law not only tolerates the existence of unwanted ownership but also actively produces it through a variety of doctrines.[81] However, the pattern of examples suggests that certain features tend to accompany observed instances of unwanted ownership. Taking note of these features will help to develop the basis and limits of forced ownership.

First, ownership is rarely forced in a full and permanent sense, insofar as it is usually possible to avoid it by incurring some cost or paying some penalty. Even if the law purports to force ownership without any escape hatch, compelled possession is more difficult and unusual to enforce injunctively than compelled nonpossession. This asymmetry makes it likely that only financial responsibility would follow from shirking the duties of ownership.[82] Ownership avoidance opportunities, whether de jure or de facto, are significant. They help to mitigate the costs to unwilling owners of unwanted ownership, but they also reduce the benefits that society can realize through such (attempted) compulsion.

Second, unwanted ownership typically follows some earlier, identifiable choice (often, the choice to enter into some *desired* ownership relationship). This makes it possible to recast unwanted ownership as a *wanted* ownership bundle that merely contains some aversive elements—as ownership generally does. Limits on abandonment offer a clear example.[83] By becoming an owner in the first instance, one has effectively signed up to remain an owner until one can find someone else to accept the job; ownership today is bundled with ownership tomorrow. Ownership that begins involuntarily can also be characterized as a bundled choice, insofar as the ownership obligation is tied to some earlier decision that might be characterized as voluntary—whether to obtain some other ownership interest (such as the mother of the animal one now owns against one's will), or to engage in some act or omission for which ownership follows remedially or by operation of law.

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80. See supra Part I.B (discussing reasons why ownership might be aversive).

81. See supra Part I.A (detailing examples of legally imposed ownership).

82. The informal abandonment of real property by a judgment-proof owner may be understood in this way, even though true abandonment is a legal impossibility. Similar points have been made in critiquing the distinctions among property rules, liability rules, and inalienability rules pioneered in Calabresi & Melamed, supra note 6. See, e.g., Dale A. Nance, Guidance Rules and Enforcement Rules: A Better View of the Cathedral, 83 Va. L. Rev. 837, 852–53 (1997) (observing that Calabresi and Melamed's "rules" governing transfers of entitlements may be broken).

83. See supra text accompanying notes 49–58 (discussing these limits).

These observations make it hard to pin down when we are dealing with a case of involuntary ownership, as opposed to just ownership. Consider the law of increase, which makes the offspring of one's female animals one's own. If circumstances exist in which an owner, Owen, would prefer not to be the owner of a newborn calf recently born to his cow Bossy, can we say that the law has forced ownership of the calf on Owen? On one account, yes: The ownership came unbidden and is (by hypothesis) aversive. On another view, though, Owen voluntarily acquired Bossy (or perhaps voluntarily acquired Bossy's mother) and thereby accepted the incidents of owning Bossy—one of which is owning Bossy's offspring.[84] Owning Bossy's calf may be an aversive aspect of owning Bossy, but is it any different from being forced to buy food for Bossy, or "owning" the results of damage that Bossy causes if she strays onto someone else's property? Is Owen forced to *be* an owner (of the calf), or is Owen just forced to accept the responsibilities that naturally go with ownership (of Bossy)?[85]

There is no obvious answer without resort to external principles about what ownership should entail. Property mavens will notice that this inquiry is the flip side of the baseline problem that emerges in regulatory takings contexts: When owner Olive is prohibited from expanding her cottage, which is located on wetlands, has something been "taken" from her, or is the law instead merely recognizing the inherent limits on her title?[86] The questions quickly devolve into normative ones. It is always possible to trace the imposition of an unwanted element of ownership to

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84. Merrill similarly observes that one might characterize accession "not [as] a principle about the initial acquisition of property rights so much as a principle about the scope of property rights already acquired." Merrill, Accession, supra note 19, at 481. However, he resists this interpretation on the ground that the added property interests (such as baby animals) seem "most naturally regarded as being separate or distinct from the thing that supplies the basis for accession." Id.

85. In other words, where are the natural or logical seams in ownership located? Eduardo Peñalver explores one aspect of this question in observing that one can unilaterally abandon the benefit (though not the burden) of a servitude on land, since this does not mean walking away from obligations one has taken on. Peñalver, Illusory Right, supra note 7, at 212. He compares the case of fee ownership for which no abandonment is available:

> When ownership is conceived of as a social practice permeated by obligation, all property labors under a sort of servitude for the benefit of the communities in which the property is situated . . . . And, just as the owners of servient estates cannot unilaterally walk away from the obligations imposed by servitudes, the unilateral abandonment of property, especially land, is equally problematic.

Id. at 213. This analysis suggests that ownership is an undivided and eternal whole that cannot be temporally broken at a point of the owner's (unilateral) choosing. Rather, the owner must make an appropriate deal with some third party to accept the associated burdens. Yet this still does not determine the content of those burdens—for that, one must resort to some external normative theory.

86. Cf. Bell & Parchomovsky, Givings, supra note 10, at 612–14 (discussing baseline issues in charging for givings as well as paying for takings).

some prior voluntary act, but when do these linkages or bundlings become impermissibly attenuated or coercive?

I will return to this issue of bundling below.[87] For now, an observation suffices: It is no accident that the existing examples of unwanted ownership tend to involve relatively tight causal connections between earlier choices and later ownership obligations. Without a theory of forcings to rely on—one that might include the prospect of compensation—ownership is unlikely to be imposed except in instances where the associated burdens appear normatively justified. These are likely to also be circumstances in which the resulting ownership bundles appear coherent.

II. WHY FORCE OWNERSHIP?

Why would the law ever force an individual to start or maintain an ownership relationship that the individual herself did not find desirable? At first blush, the question has an obvious answer. If ownership makes a party responsible for making payments, accepting liability, or bearing the costs of disposal or transfer, the social interest in imposing it over the owner's wishes might seem self-evident. But on closer inspection, the choice of mandating *ownership* requires more explanation. Section A makes some observations about the "ownership strategy" and how its consequences vary from those produced by a system of damage payments. Section B turns to some reasons why society might prefer to impose ownership.

A. *The Ownership Strategy*

Henry Smith has helpfully focused attention on the "exclusion strategy" that property rights typically employ.[88] Boundary exclusion creates a protected realm in which an owner can access resources free of outside invasion, and within which she can use self-help to keep her own impacts inside and those of others outside.[89] The exclusion strategy works in tandem with governance strategies that help to protect the outside world

87. Infra Part V.B.2.

88. See Henry E. Smith, Property and Property Rules, 79 N.Y.U. L. Rev. 1719, 1755–56 (2004) [hereinafter Smith, Property Rules] (explaining how exclusion strategy operates and distinguishing it from governance).

89. See id. at 1755 ("Within this zone of protection, owners have the choice of how to invest in or consume the asset."); see also Lee Anne Fennell, Property and Half-Torts, 116 Yale L.J. 1400, 1446 (2007) [hereinafter Fennell, Half-Torts] (observing "owner's broad control over a spatial area" enables her "to prevent her own onsite activities from producing risks that extend beyond the property's borders"); Thomas W. Merrill, The Property Strategy, 160 U. Pa. L. Rev. 2061, 2066 (2012) [hereinafter Merrill, Property Strategy] (outlining "the property strategy," which focuses on "the nature of the prerogatives given to those called owners").

from the activities of the property owner, and vice versa.[90] For example, property's exclusion strategy allows a factory owner to place a ring fence around the plant to protect widgets from being spirited away, while the complementary governance strategy imposes liability for pollution that spills over the property line.[91]

This influential picture of property is useful but incomplete. Ownership also, and crucially, involves a certain allocation of risk.[92] To own something is to bear outcomes—outcomes that may be influenced only probabilistically by one's own inputs.[93] Exclusion backed by governance allows owners to construct and control the environments in which they invest inputs and realize outcomes, reap and sow. But risk remains. As a result, owning outcomes (the actual crop, say) is a very different thing than being directly assigned *expected* outcomes (the expected value of the crop). The difference usually goes unnoticed because owners self-select into property ownership when they find the risks worth bearing and leave ownership when this is no longer the case. With freely alienable and marketable property that is protected by property rules, an owner can choose at any time whether to select actual outcomes (become or remain an owner) or expected outcomes (cash out now).

There are two situations where the difference between expected outcomes and actual outcomes is starkly presented. One is when ownership is terminated involuntarily, as through eminent domain. The other

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90. See generally Henry E. Smith, Exclusion Versus Governance: Two Strategies for Delineating Property Rights, 31 J. Legal Stud. S453 (2002) (describing and analyzing these two strategies).

91. See Henry E. Smith, Property as the Law of Things, 125 Harv. L. Rev. 1691, 1718 (2012) (using trespass and nuisance to illustrate exclusion and governance, respectively).

92. To be an owner is to be the residual claimant for whatever aspects of a resource have not been parceled out to others. E.g., Smith, Property Rules, supra note 88, at 1795–97. Ownership, then, should be assigned based on the ability to control those sources of variance. See Yoram Barzel, Economic Analysis of Property Rights 78 (2d ed. 1997) ("A party is expected to assume more of the variability, that is, become more of a residual claimant as its effect on the mean outcome increases."). However, given imperfect insurance markets, there will typically remain additional sources of variance that are not under the owner's control but that nonetheless influence the outcomes she will experience.

93. Smith recognizes the significance to property ownership of the ability to place and collect on bets, such as the possibility that a piece of land will become a future tourist destination. Henry E. Smith, Exclusion and Property Rules in the Law of Nuisance, 90 Va. L. Rev. 965, 984 (2004) (giving this example and observing "property protection allows the owner to bear the consequences of this bet on the future"); Smith, Property Rules, supra note 88, at 1729 ("Ownership concentrates on the owner the benefits of information developed about—and bets placed on—the value of the asset."). But because Smith assumes that the bets are voluntarily undertaken, he does not address the possibility that ownership could create aversive risk arrangements. Likewise, Merrill's explication of "the property strategy" recognizes the incentive effects that accompany making the owner the residual claimant, but devotes little space to downside risk exposure. See Merrill, Property Strategy, supra note 89, at 2092–93 (suggesting insurance and social safety nets largely address concerns about risk).

is when ownership is forced. Where ownership is cut short, one loses the right to try one's hand at getting actual outcomes that exceed expected outcomes—although one may also be saved from the risk of getting actual outcomes that are lower than expected outcomes.[94] Forced ownership effectuates a different swap: One is made to bear actual outcomes, rather than simply being charged with expected outcomes. It is a different thing to pay damages (even "permanent damages" designed to cover projected future impacts) than it is to be exposed to ongoing liability. The two situations present different risk profiles and incentive structures.

It is easier to grasp what the ownership strategy does by examining its metaphorical application to a different area of law—tort. Arthur Ripstein has developed a concept of "risk ownership" that makes people owners (in some sense) of the risks they create by acting in the world.[95] On this view, actors are properly saddled with (some) actual outcomes that flow from their behavior, not the expected value of the risks they generate.[96] This, after all, is what it means to be an owner.

The bite of this approach can be seen in its treatment of "moral luck."[97] As a result of sheer chance, identical inputs (equally inattentive driving, say, or leaving a baby unattended in a bathtub for an equal amount of time) can produce dramatically different outcomes (a catastrophic accident in one case, and nothing at all in another).[98] Even though the human inputs may be morally equivalent in the two sets of cases, the law treats the respective actors very differently.[99] The negligent driver or caregiver who causes an accident will suffer severe consequences, while her equally culpable doppelgänger who luckily avoids causing harm walks away unscathed.[100] Viewing the generator of a risk as

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94. The statement in the text assumes that expected returns get built into the fair market value standard used to determine the adequacy of compensation.

95. Arthur Ripstein, Equality, Responsibility, and the Law 53–93 (1999).

96. See id. at 72–74 (using risk ownership concept "to explain why no liability arises for the mere imposition of risk" and noting "element of luck" involved).

97. See id (drawing this connection). For discussion of moral luck, see generally Thomas Nagel, Moral Luck, *in* Mortal Questions 24 (1979); Bernard Williams, Moral Luck, *in* Moral Luck: Philosophical Papers 1973–1980, at 20 (1981); John C.P. Goldberg & Benjamin C. Zipursky, Tort Law and Moral Luck, 92 Cornell L. Rev. 1123 (2007); Jeremy Waldron, Moments of Carelessness and Massive Loss, *in* Philosophical Foundations of Tort Law 387 (David G. Owen ed., 1995).

98. See Nagel, supra note 97, at 30–31 ("If one negligently leaves the bath running with the baby in it, one will realize, as one bounds up the stairs toward the bathroom, that if the baby has drowned one has done something awful, whereas if it has not one has merely been careless."); Waldron, supra note 97, at 387 (giving example of two momentarily distracted drivers, one who collides with a motorcyclist and another who proceeds without incident).

99. See, e.g., Waldron, supra note 97, at 387–88 (noting moral equivalence between two drivers who were equally careless, where only one caused an accident).

100. See, e.g., Goldberg & Zipursky, supra note 97, at 1128 ("[W]hen one actually considers how culpability and blame are assigned in real life, it is evident that ordinary moral judgment is sensitive to luck.").

its "owner" offers a way to understand or at least normalize this apparent anomaly. Letting outcomes (both catastrophic and benign) fall on risk generators is arguably no more odd than leaving the upside and downside risks of a vegetable garden or a shopping development on an owner, even though external forces will determine whether certain acts of cultivation or neglect translate into success or failure.[101]

The ownership concept sits uneasily in the tort framework, however, as Ripstein recognizes.[102] Tort risks are typically not bounded by exclusion rights in the way that property tends to be.[103] This fact deprives actors of control over how risks will play out[104] and requires that tort law synthesize some conceptual substitutes for physical boundaries to cabin the scope of liability.[105] Moreover, potential *benefits* generated when acting in the world are considerably less amenable to "ownership" under tort law than are potential harms.[106] Tort doctrines may nonetheless be

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101. Cf. Tony Honoré, Responsibility and Luck, 104 Law Q. Rev. 530, 539–41 (1988) (casting tort liability as outcome of series of gambles in which most people win more than they lose).

102. See Ripstein, supra note 95, at 47 (noting indeterminacy of ownership "in a world of risks").

103. See Fennell, Half-Torts, supra note 89, at 1447 (explaining how property boundaries grant owners considerable choice about how to contain impacts and prevent them from spilling over onto others' property).

104. Exclusion offers a way of controlling the background against which risks play out and the identity and characteristics of parties exposed to the risks. For example, members of a household without any young children can keep prescription medicines that are not in child-proof containers out on a countertop without thereby creating any significant risk, assuming no children are invited into the household and ordinary exclusion measures are taken to keep neighborhood children from wandering in unattended.

105. Doctrinal requirements like proximate cause and duty might be understood in this way, in that they narrow down the outcomes for which one will be held responsible. More fundamentally, negligence pares down the scope of liability based on notions of fault; strict liability, by contrast, defines the outcomes for which one will be responsible independent of fault. See Honoré, supra note 101, at 541–42 (explaining how strict liability imposes "outcome-responsibility" based on risk creation). In both cases, however, the boundaries around the outcomes one "owns" are set conceptually rather than through physical property boundaries selected by an owner. For this reason, risk ownership represents an interesting form of forced ownership (to the extent it is properly regarded as ownership at all).

106. See, e.g., Porat, supra note 11, at 195–98 (noting dearth of remedies for unrequested benefits provided to others). If all of the costs were charged to one's account and none of the benefits, then there would be too little engagement in activities that do not cause expected harm on net. Indeed, one compelling rationale for limiting the scope of liability is to account for the positive spillovers associated with everyday activities. See Keith N. Hylton, Duty in Tort Law: An Economic Approach, 75 Fordham L. Rev. 1501, 1502 (2006) (noting duty doctrines that limit liability play a role in "encourag[ing] or subsidiz[ing] activities that carry substantial external benefits").

understood as forcing ownership of a subset of risks thought to align with the boundaries of the actor's own benefit catchment area.[107]

Whether or not one views ownership as an apt metaphor in the tort realm, actual ownership does its work not by evaluating inputs but rather by assigning returns on activity within a designated domain, such as a parcel of land, to the property's owner.[108] Property can be conceptualized as "a leaky bucket of gambles."[109] It delivers not a basket of *expected* outcomes, but rather the outcomes themselves, over time. The bucket is leaky and prone to sloshing, however: Not all inputs are under the owner's control, and not all outcomes get fully charged to the owner. Still, ownership endeavors to achieve a reasonably well-aligned pairing of inputs and outcomes.[110] Ownership thus amounts to a container within which outcomes are one's responsibility, and for which one bears any attendant risks one has not managed to offload to others.[111] Other legal rules may stretch this container to capture more outcomes that are normatively relevant or fewer that are normatively irrelevant.[112] But these same objectives might at times be pursued by extending or forcing ownership itself.

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107. See Honoré, supra note 101, at 542 (explaining that strict liability, as applied to activities that usually generate positive returns for actors, "merely serves to surcharge on grounds of social policy the debit side of an account which is in most instances comfortably in credit").

108. See supra notes 92–93 and accompanying text (discussing owner as residual claimant). In a world of perfect information and costless administration, the law could tax, subsidize, punish, and reward all human inputs directly based on their expected marginal contributions to negative or positive outcomes. But where inputs are extremely difficult to measure or trace, property offers a powerful alternative. See Smith, Property Rules, supra note 88, at 1796–97 (explaining how ownership, by assigning residual claim, captures contributions that are difficult to measure).

109. See Fennell, Half-Torts, supra note 89, at 1405, 1442–43 (developing this metaphor).

110. Achieving a perfect alignment would be unduly costly, but property should endeavor to charge or credit outcomes to the owner when it can do so cost effectively. See Harold Demsetz, Toward a Theory of Property Rights, 57 Am. Econ. Rev. 347, 350 (1967) ("[P]roperty rights develop to internalize externalities when the gains of internalization become larger than the cost of internalization.").

111. As the common availability of homeowner's insurance suggests, owners need not personally bear all risks. See, e.g., Lee Anne Fennell, Homeownership 2.0, 102 Nw. U. L. Rev. 1047, 1060 (2008) [hereinafter Fennell, Homeownership].

112. Land use controls designed to address cross-boundary spillovers are a primary example. Doctrines like private necessity also adjust the prerogatives of ownership while encouraging parties to behave toward the property of others as if they were its owner. See, e.g., Vincent v. Lake Erie Transp. Co., 124 N.W. 221 (Minn. 1910) (holding boat owner liable for damage to dock he used during storm, even though use was justified by private necessity); Richard A. Epstein, Holdouts, Externalities, and the Single Owner: One More Salute to Ronald Coase, 36 J.L. & Econ. 553, 577–79 (1993) [hereinafter Epstein, Holdouts] (discussing incentives in context of private necessity).

B. *Ownership's Edge*

Understanding that ownership's basic strategy entails responsibility for outcomes, not inputs, helps explain the motivation for forced ownership. Identifying an owner means something different from imposing a charge: It is an answer to the question, "Whose problem is this?"[113] There are sensible reasons why the law might choose to answer *that* question, rather than a series of other questions about the nature, extent, probable solution, and expected value of the problem. The sections below offer a set of (somewhat overlapping) rationales for requiring ownership. Taken together, they focus on how channeling responsibility for outcomes into particular patterns or bundles of ownership addresses information and incentive problems.

1. *Economizing on Information.* — One reason for forcing ownership is to economize on the costs of gathering and using information. Consider trover, which requires a party who has converted the property of another to purchase that property. It might seem at first that a damage award would serve just as well, and indeed the remedy of replevin offers just such an alternative.[114] An advantage of forcing ownership, however, is that it sidesteps the need to calculate damages. Payment is based on the fair market value of the undamaged item; the transfer of the thing itself will credit back any remaining value to the new owner.[115] Disagreements about the extent of the damage need not be entertained, nor must the erstwhile owner bear the risk that the condition of the thing will deteriorate further as a result of additional hidden vulnerabilities (such as hairline fractures in a vase).

Consider how this approach would work in a nuisance context involving a polluting factory: The affected property would be forcibly transferred at its (unpolluted) fair market value to the polluters, at the election of the current owners.[116] What is notable about this solution

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113. Deciding who is responsible for a problem is, of course, a normative conclusion about who should be responsible. See Ripstein, supra note 95, at 47 (observing "talk of people owning risks and misfortunes is simply a way of spelling out the idea expressed in such familiar idioms as 'that's not my problem'" based on some normative account of proper risk distribution).

114. See supra note 16 and accompanying text (discussing conversion remedies).

115. As Richard Epstein explains:

> Once the chattel is damaged, it is tricky to figure out what damages are needed to make the plaintiff whole, so that the long-established election of remedy allows the plaintiff simply to liquidate his original investment for cash. The remedy of forced purchase requires the defendant, quite simply, to pick up the pieces when the chattel is destroyed and to take the up and down of its value when the chattel is taken.

Epstein, Protecting Property, supra note 19, at 850–51.

116. This is not a remedial approach to which courts have been receptive. See supra text accompanying notes 20–21 (discussing failed attempt to force convicted sex offender to buy home of victim's family); see also Ayres, supra note 6, at 37 ("Courts do not award plaintiffs remedial puts even when defendants intentionally create a nuisance."). Even the

from an information-cost perspective is that it does not require calculating damages in advance or returning to court over time as consequences unfold.[117] Moreover, the new single owner of the consolidated parcel will be expected to make optimal decisions about how to coordinate conflicting land uses going forward.[118]

In the examples just given, the problem to which ownership was offered as a response was relatively well defined: a damaged object, a polluted parcel. But the information-cost savings associated with the ownership strategy become even more important when the nature of the problems coming down the pike are as yet undefined. The unknown and unknowable nature of future problems explains the law's unwillingness to leave things unowned. Gaps in seisin (possessory ownership) are not permitted for real property under the common law, and the same rule applied to chattels until the sixteenth century.[119] A likely reason was to make sure there was always someone who was responsible for the property, to whom liability could attach if necessary.[120]

These rationales relate closely to the risk-bearing and incentive aspects of ownership, which will be developed below.[121] But they find additional footing in information-cost savings by economizing on the very task of finding out who is in a good position to bear risk or respond to incentives. The ownership strategy farms out that entire set of problems, leaving the owner to decide what to do about them. By limiting the ways in which people can rid themselves of both chattels and (especially) real property, the law tries to channel property reassignment into forums in which information costs are bearable. In the meantime, owners are

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academic literature on put options in the nuisance context has generally contemplated not the forced purchase of a possessory interest in the property, but rather the forced purchase of, say, an entitlement to pollute. See id. at 15–16 (working through example involving a put option for a pollution entitlement).

117. Existing work on put options in the nuisance context has focused on a different kind of informational advantage: the capacity of the exercise of the put option itself to reveal information about which party more highly values a given nonpossessory entitlement, such as the right to emit pollutants. See Ayres, supra note 6, at 20–21, 25 (describing information-forcing properties of put options and call options, and differences between them).

118. For example, the new owner of the consolidated tract will decide how and whether to operate the factory based on which of the conflicting land uses is more valuable. See Epstein, Holdouts, supra note 112, at 556–57 (explaining how applying single-owner test identifies efficient results). The advantages identified in the text may of course be overwhelmed by other drawbacks of the approach; the point here is simply to identify what the imposition of ownership adds to the situation.

119. See A.H. Hudson, Is Divesting Abandonment Possible at Common Law?, 100 Law Q. Rev. 110, 118 (1984) (noting this history and observing "one of the best-established rules here was that there could be no abeyance of seisin").

120. See id. ("A practical consequence of this [rule against abeyance of seisin] in relation to chattels may have been that liabilities in respect of the chattels could always be attributed to an owner or possessor.").

121. Infra Part II.B.4.

kept paired with their property, which reduces the costs of learning about the property's status.

To say that it is useful to have *some* owner of record does not, of course, make a case for the current method of picking out who shall serve in that capacity. Gaps in seisin could be prevented equally well if unwanted property could be decisively ceded to, say, an agency of the state.[122] Where property is objectively negative in value, an auction might be held to see who would accept the property at the lowest price.[123] Some of these approaches might be good solutions in certain contexts, as will be discussed below.[124] Yet all of them cost something to implement. Letting ownership lie where it falls has an immediate edge—saving society the cost of identifying a better owner.

2. *Dispersing Obligations.* — Ensuring that land remains owned does more than satisfy a societal sense of order. It also maintains a platform for imposing obligations.[125] While the social obligations accompanying property ownership have received a great deal of recent attention,[126] unwanted ownership pushes us to consider why these obligations would ever be imposed in kind. Here, other aspects of the information-cost story become relevant: the widespread information gathering and localized monitoring that dispersed private ownership facilitates.[127]

Pervasive private land ownership creates a web of location-specific obligors who can be called upon to collectively accomplish large-scale

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122. See Strahilevitz, Right to Abandon, supra note 7, at 394–95 (discussing civil law countries that permit relinquishment of real property to the state).

123. See, e.g., Herbert Inhaber, Slaying the NIMBY Dragon 41–69 (1998) [hereinafter Inhaber, NIMBY] (providing accessible account of how reverse Dutch auction can be used to allocate bads); Herbert Inhaber, Market-Based Solution to the Problem of Nuclear and Toxic Waste Disposal, 41 J. Air & Waste Mgmt. Ass'n 808, 812–15 (1991) (proposing reverse Dutch auction approach for siting waste); Michael O'Hare, "Not on My Block You Don't": Facility Siting and the Strategic Importance of Compensation, 25 Pub. Pol'y 407, 438–56 (1977) (analyzing auction approaches to facility siting).

124. See infra Part IV.B.1 (discussing repricing of ownership).

125. See Peñalver, Illusory Right, supra note 7, at 213 (suggesting affirmative obligations of ownership explain common law limits on abandonment).

126. For recent examples of literature in this vein, see generally Gregory S. Alexander, The Social-Obligation Norm in American Property Law, 94 Cornell L. Rev. 745 (2009); Eduardo M. Peñalver, Land Virtues, 94 Cornell L. Rev. 821 (2009); Joseph William Singer, Democratic Estates: Property Law in a Free and Democratic Society, 94 Cornell L. Rev. 1009 (2009). For an overview and critique of various strands in the progressive property movement, see generally Ezra Rosser, The Ambition and Transformative Potential of Progressive Property, 101 Calif. L. Rev. 107 (2013).

127. The law's interest in picking out owners who are well positioned to serve such information gathering and monitoring functions may explain, for example, the residency and use requirements associated with the Homestead Act. See Barzel, supra note 92, at 121–23 (suggesting homesteading restrictions may have been designed "to induce settlers' self-protection against raids where such protection was cheaper than direct protection by the state," and "to ensure that the land would actually be densely occupied").

tasks, like clearing a city's entire sidewalk system of snow.[128] Many of these tasks could be collectively provided and the owners charged, but giving each owner responsibility over her own location offers a flexible and responsive system that can be scaled up or down, with duties added or subtracted as needed.[129] Significantly, such a system takes advantage of dispersed local knowledge.[130] Similarly, private measures to safeguard property, such as deadbolts and fences, can also reduce the cost of public enforcement (relative to a baseline in which the land is unowned or publicly owned).[131] Again, the ability to engage in flexible, context-specific measures based on local information may make private enforcement a useful complement to public enforcement.[132]

The widespread localized monitoring that accompanies dispersed private ownership also generates expectations among third parties that help to sustain social order. Presumptively owned property may be less likely to be vandalized or broken into, on the assumption someone is looking after it.[133] Likewise, the assumption that property is owned, and not up for grabs, can prevent wasteful or dangerous races to establish new ownership.[134] Warding off these acts is socially desirable; in addition to potentially dissipating the value of the property, they can have harmful spillovers.

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128. See Larissa Katz, Governing Through Owners, 160 U. Pa. L. Rev. 2029, 2051 (2012) [hereinafter Katz, Governing] (discussing snow shoveling and other localized duties states may assign owners).

129. See id. at 2035–39 (characterizing ownership as "an office" that "enables states to allocate responsibility systematically and on a mass scale even as the people who hold those offices come and go").

130. See Robert C. Ellickson, The Affirmative Duties of Property Owners, 3 Brigham-Kanner Prop. Rts. Conf. J. (forthcoming) (manuscript at 8–15), available at http://ssrn.com/abstract=2464545 (on file with the *Columbia Law Review*) (emphasizing role of local knowledge as justification for placing affirmative burdens on landowners); Merrill, Property Strategy, supra note 89, at 2081–83 (noting property's decentralized nature and "ability to harness local knowledge").

131. Cf. Abraham Bell & Gideon Parchomovsky, The Case for Imperfect Enforcement of Property Rights, 160 U. Pa. L. Rev. 1927, 1935–50 (2012) (examining how availability of public enforcement creates potential moral hazard as to private protective measures).

132. Cf. Katz, Governing, supra note 128, at 2041–42, 2050 (giving example in which theater assigns each person a seat and charges her with putting out any fires that break out under that seat, thereby producing "a system of fire control for the entire theater").

133. See Hudson, supra note 119, at 117–18 (discussing and qualifying claim that ban on abandonment operates as "deterrent to vandalism and theft").

134. Costly races to establish ownership are easy to envision with a first-in-time rule of physical possession, although other methods of assigning ownership are possible. See, e.g., Strahilevitz, Right to Abandon, supra note 7, at 374–75 (noting "lawless-race costs" for property abandonment); id. at 410–11 (considering alternative of granting rights to first person to reply to online listing). Ownership protocols that are not based on establishing physical possession could still produce deadweight losses, if less dramatic ones, as multiple people attempt to simultaneously fulfill the requirements for ownership.

Of course, the social harms of nonownership are not necessarily avoided through forced ownership. People can and do vacate and neglect their properties even if the law continues to recognize them as owners. If they are judgment-proof, they may shirk their obligations as owners with relative impunity.[135] Similarly, dangerous and wasteful races can be produced not only by unowned things, but also by things that an owner offers to transfer at a below-market price.[136] However, it is possible that ownership may operate as a kind of moral suasion that causes owners to act more responsibly toward the owned item.[137] Moreover, even if individual owners fall down on the job, the assumption that dispersed, concerned monitors are paying attention and looking out for property may create a kind of herd immunity that pushes back disorder.[138] This rationale falls apart, however, if property neglect becomes obvious and widespread—as might occur when involuntary ownership makes up a significant share of observed ownership. Thus, urban areas with large concentrations of homes that have been left vacant by their owners presumably gain little or no benefit from the fact that the homes in question remain nominally owned.

3. *Consolidating Complements.* — Sometimes it is more important to get a complementary set of property rights into the *same* hands than it is

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135. Legal responsibility may have some effect even on the judgment-proof, insofar as they may hope or expect to not remain so forever. Ownership also confronts owners with the opportunity cost of failing to make valuable use of the property, where such use is possible. Even a largely theoretical responsibility for the downsides associated with the property might cause owners to pay attention to the upsides as well.

136. For example, the below-market pricing common on "Black Friday" has contributed to tramplings and other outbreaks of violence. See, e.g., Robert D. McFadden & Angela Macropoulos, Wal-Mart Employee Trampled to Death, N.Y. Times (Nov. 28, 2008), http://www.nytimes.com/2008/11/29/business/29walmart.html (on file with the *Columbia Law Review*); Joseph Serna, Black Friday Melee on Video at Georgia Wal-Mart, Trampling in Texas, L.A. Times (Nov. 23, 2012), http://articles.latimes.com/2012/nov/23/nation/la-na-nn-black-friday-melee-georgia-texas-walmart-20121123 (on file with the *Columbia Law Review*).

137. Maintaining the ownership relationship could also influence the owner's valuation of the thing in question, which could in turn affect behavior regarding it. Although the nature, causes, and indeed existence of an "endowment effect" have been the subject of extensive recent debate and study, how ownership influences people's valuations remains unsettled. See, e.g., Keith M. Marzilli Ericson & Andreas Fuster, The Endowment Effect, 6 Ann. Rev. Econ. 555, 563–64, 571–72, 575 (2014) (reviewing recent literature on this point and noting open questions). It is even less clear whether and how such an effect would apply where the property is unwanted. Research on this issue could carry implications for both forced acquisition and forced retention.

138. For example, a few unlocked cars or apartment doors in a sea of carefully secured properties will be unlikely to attract casual thieves or vandals, because the returns to trying every door are so low. Indeed, a nontrivial number of people subscribe to a "no lock" philosophy. See Joyce Wadler, The No Lock People, N.Y. Times (Jan. 13, 2010), http://www.nytimes.com/2010/01/14/garden/14nolock.html (on file with the *Columbia Law Review*) (reporting on people who regularly choose not to lock doors to their homes, including some residents of New York City and other major cities).

to get individual components into the highest-valuing hands.[139] Although parties might be expected to voluntarily put together complementary bundles in most cases, sometimes intervention in the form of forced ownership plays a role.

Accession and mistaken-improver cases offer some of the simplest and clearest examples. It is obvious that a canvas and the artwork painted on it should end up in the same ownership, and it is clearly undesirable to have a building straddle a property line. Because these situations present bilateral monopolies that may make it difficult for the parties involved to negotiate solutions, unilateral transfers are likely to be attractive alternatives. Forcing one party to sell to the other is one alternative, but so too is forcing a party to buy from the other—and the latter might in some cases seem normatively preferable.[140] Indeed, it is not uncommon to offer the encroached-upon party a choice between such remedies: Buy out or be bought out.[141]

Many of the ways that law assigns rights to previously unowned resources can be understood through the lens of complementarity as well. The law of increase and the accretion doctrine are good examples—property is added to proximate or logically related existing holdings.[142] Although instances could exist in which the interests will be more valuable if split apart,[143] these are perhaps rare enough to make it efficient for the property system to assign ownership in the way that it does.[144] More generally, default property packages, which can be costly to break apart, are arguably designed to reflect complementarities. Doctrines that pressure or encourage certain ownership patterns can often be explained by complementarities as well. For example, conditioning a neighbor's right to defeat a variance on her offer to purchase the prop-

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139. See, e.g., Thomas W. Merrill & Henry E. Smith, Making Coasean Property More Coasean, 54 J.L. & Econ. S77, S92–99 (2011) (emphasizing need to attend to content of property packages, given positive transaction costs).

140. For example, an encroached-upon landowner who encouraged mistaken improvements on the land might be made to buy them. See, e.g., Ollig v. Eagles, 78 N.W.2d 553, 560 (Mich. 1956).

141. See supra notes 17–18 and accompanying text (discussing such remedial choices).

142. See supra text accompanying notes 39–42 (discussing these doctrines).

143. For example, a riparian landowner who gains property by accretion but whose own plans for the property do not include access to the water might value the added increment of land less than his neighbor would. Or, to take another example, a newborn calf that is rejected by its mother might be less valuable in the hands of the owner of the mother cow than under the ownership of another individual who is better positioned to hand raise it.

144. Thanks to Kenneth Ayotte for discussions on this point. Merrill focuses on a related aspect of complementarity: the overlap between the skills necessary to be a successful owner of the initially acquired interest and those necessary to successfully own the interests added later through accession. See Merrill, Accession, supra note 19, at 488–91 (suggesting law uses past ownership of related interest as proxy for identifying fit owner).

erty for which the variance was sought arguably forces information about whether complementarities are present between the neighboring properties.[145] Complementarities can also explain prohibitions on the destruction of historic properties (that is, the forced retention of certain structures) under the tout ensemble doctrine.[146]

4. *Aligning Incentives.* — Some unwanted ownership can be understood as buttressing the self-enforcing incentive system that private property is thought to embody. A standard example of (or metaphor for) the incentive-alignment potential of property ownership is that of reaping where one has sown.[147] Simple agrarian illustrations are popular because they present a plausible scenario in which the benefits and burdens associated with one's acts are confined to the physical plot one owns.[148] The farmer in the example owns her own labor and the land; property law assigns her the crops that result from mixing these elements with inputs that she also owns, such as seeds and fertilizer. There are no significant externalities in the story. Whether property operates in this manner, however, depends crucially on the way in which ownership packages are scaled and defined.

Consider instead a "flyaway" crop that predictably lands a quarter mile southwest of where it is sown. Here, the story does not work so well, unless the property is redefined to include the catchment area, or the crops themselves can somehow be associated with their sower.[149] Allowing the crop-landing zone to be owned on its own does not align incentives (no one would bother sowing); incentives similarly fall out of alignment if the crops stay put on the owned land but sprout noxious traveling spores whose effects are not charged back to the owner. Property boundaries must be set in a way that produces incentive alignment, or must be buttressed with governance structures that stand in for physical boundaries where the latter cannot realistically be employed.[150] Property's social value, in other words, depends on package construction.

Some unwanted ownership, then, may involve elements added to a given ownership package to better align incentives. If small properties

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145. See supra note 22 and accompanying text (describing New Jersey's conditional variances).

146. See supra note 60 and accompanying text (discussing such prohibitions).

147. E.g., Merrill, Property Strategy, supra note 89, at 2083.

148. See, e.g., id. at 2071–72 (presenting example of family farm). These examples predominantly feature "small events," to use Robert Ellickson's nomenclature. See Ellickson, Property, supra note 9, at 1327–30.

149. Cf. Ghen v. Rich, 8 F. 159, 159–60 (D. Mass. 1881) (describing usage in which distinctive harpoon markings allowed whale to be identified with harpooning whaler, despite use of bomb-lance technology that did not keep whale physically tethered to whaling boat).

150. See, e.g., Smith, Property Rules, supra note 88, at 1756 ("Using fences to modulate complex questions of use—such as proper grazing technique or optimal noise levels—would be prohibitively costly."); id. at 1756–57 (describing governance as "lowest-cost method where stakes are high enough to require precision in delineating uses").

enable more cross-boundary externalities, larger properties might be mandated, as through zoning restrictions. If short time slices of ownership lead to dealing in a present-focused way with the land, longer time slices may be mandated, as through limits on short-term leases. If introducing rental housing or recreational opportunities into an area and then withdrawing them will visit terrible harms on the community, then landlords or owners of recreational facilities may be required to make these opportunities available for a minimum period of time (even if it means that fewer owners choose to provide those opportunities initially).

Ownership bundles may also be constructed to moderate access to local public goods or common-pool resources. The Tiebout hypothesis is built on the idea that procuring residential services also means purchasing a basket of local public goods and services.[151] The idea of tying ownership obligations to common-pool resource access is built into other observed arrangements as well, including cattle "wintering rules" used in some Swiss villages, which prohibit sending more cows to the grazing lands than one can feed during the winter,[152] and medieval common-field arrangements that scatter individually owned farming strips within a seasonal grazing commons.[153]

III. CHARTING FORCINGS

The discussion to this point has suggested why ownership that is privately unwanted might nonetheless be socially valuable. This Part examines how forcings fit conceptually into the overall scheme of private ownership and state power. Section A examines governmental acts that *change* who owns a particular piece of property, whether by coercively taking it away from a current owner, giving it to a willing owner, forcing it on an unwilling owner, or accepting it from an owner who no longer wants it. Section B shows how these acts connect to existing ownership and nonownership arrangements, which may be wanted or unwanted, socially harmful or socially beneficial. This analysis reveals misalignments between private and social payoffs that could be addressed through changes in ownership or through a variety of other means. Because any change (or nonchange) in ownership status can be accompanied by compensation, government policy can decouple questions about whether someone should be an owner or nonowner from questions about whether the person deserves to bear the associated burden.

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151. The Tiebout hypothesis posits that (under certain strong assumptions) people will sort into the local jurisdictions they prefer based on the services and taxes offered by each. See generally Charles M. Tiebout, A Pure Theory of Local Expenditures, 64 J. Pol. Econ. 416 (1956).

152. See Elinor Ostrom, Governing the Commons 62 (1990) (describing wintering rules).

153. See Henry E. Smith, Semicommon Property Rights and Scattering in the Open Fields, 29 J. Legal Stud. 131, 146–54 (2000) [hereinafter Smith, Semicommon Property] (examining incentive effects of this arrangement).

A. *Takings, Givings, Forcings, Relievings*

The government can reassign ownership of a given piece of property in four basic ways: by exercising the eminent domain power (takings), by transferring property to willing parties (givings), by compelling ownership (forcings), or by accepting transfers of property from parties who do not wish to own it (relievings).[154] Takings, givings, forcings, and relievings could occur alone or in various combinations as governmental entities attempt to optimize land use. Table 1 sets out the domains within which each of these moves would be minimally plausible as a normative and logical matter.[155] The four cells specify government actions that would begin or end ownership for a hypothetical party, *A*, based on the private and social payoffs produced by *A*'s ownership.

TABLE 1: DOMAINS OF GOVERNMENT ACTION

	New Ownership by *A* Is Socially Beneficial	Current Ownership by *A* Is Socially Costly
A's Ownership Is Privately Beneficial	I. GIVINGS	III. TAKINGS (and other coercive dispossessions)
A's Ownership Is Privately Costly	II. FORCINGS	IV. RELIEVINGS

For concreteness, consider an individual, Ani, whose relationship to a particular piece of property, Parcel *X*, may generate private benefits, social benefits, both, or neither. The distinction between Table 1's top and bottom rows goes to whether Ani herself views ownership of Parcel *X* as privately beneficial or costly. The question is a subjective one: The fact that property imposes a private burden on Ani does not mean that it would impose a private burden on another party, such as Brock. Thus, the two rows of Table 1 correspond to a given owner wanting or not

154. There are of course many additional tools, such as taxes and subsidies, that the government can use to influence the attractiveness of ownership. See infra Part IV.B (discussing repricing alternatives).

155. To say that an indicated form of government coercion is minimally plausible does not mean that it will always or often be appropriate, much less that it will always or often be observed. Rather, these are sets of necessary conditions, which may or may not be sufficient in a given instance to justify the use of government power. It is also obviously possible for the government to engage in the acts named in the chart when the conditions are *not* met—as where eminent domain inefficiently moves property to a lower-valuing user. The point of the chart is not to assert that government always or only engages in these acts when the stated conditions are met, but rather to suggest that these conditions would form a minimum predicate for an appropriate exercise of the specified governmental power.

wanting the property, respectively.[156] Property with a negative expected value would be unwanted, and hence regarded as privately costly, by almost everyone—at least in the absence of a compensatory transfer payment. But property need not have a negative expected value to be unwanted by particular parties; there may be autonomy or personhood issues at stake, or simple risk aversion.[157]

Table 1's left and right columns indicate whether Ani's ownership of Parcel *X* is socially beneficial or socially costly.[158] Because the table focuses on conditions that might cause the government to *change* the assignment of ownership, the left column involves the situation in which Ani does not (yet) own Parcel *X*, but it would be socially beneficial for her to do so. Conversely, the right column involves Ani's socially costly current ownership of Parcel *X*. In assessing social benefits and costs, much turns on the word "ownership." If we assume that the government has free rein to make and collect transfer payments to address distributive or other justice concerns, the only reason to employ coercion to change Parcel *X*'s ownership would be if *ownership itself* in a given pair of hands (here, Ani's) conferred social benefits or imposed social costs above and beyond what could be conveyed or collected through a transfer payment of equal expected value.[159]

The most familiar manifestation of government coercion is found in Cell III: takings and other coercive dispossessions.[160] Takings become plausible when, in our example, Ani's ownership of Parcel *X* has become socially costly (perhaps because Parcel *X* lies in the path of a proposed highway or rail line),[161] yet Ani finds continued ownership of the parcel privately beneficial. If the first condition were not met, the ownership change produced by the taking would lack normative justification, and if

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156. I set aside the possibility that people want property that will harm their own subjectively perceived interests or want to be rid of property that will further their own subjectively perceived interests.

157. See supra Part I.B (outlining reasons why ownership might be aversive).

158. Socially beneficial or costly here means beneficial or costly on net to the society as a whole. Because the society includes Ani, placement in the socially costly column means that the total social costs of her ownership outweigh the benefits, if any, to Ani; likewise, placement in the socially beneficial column means that the benefits to society of Ani's ownership outweigh the costs, if any, to Ani.

159. The ability of the government to make and collect transfer payments also carries implications for the stability of the rows, as discussed below. See infra Part IV.B.1.

160. "Takings," unlike the other terms used in Table 1, is a doctrinal term of art that builds in a payment obligation. Because some government actions that dispossess owners coercively do not require compensation (consider, for example, civil forfeitures), the cell's description must be broadened beyond those actions that would count as takings. For ease of exposition, the balance of the discussion uses the unadorned term "takings" to refer to all coercive dispossessions, except where it becomes necessary to draw a distinction between compensated and uncompensated dispossessions.

161. Ownership might be socially costly not only because it blocks ownership by a higher-valuing user (as in the textual example) but also because of direct effects, such as nuisance or blight.

the second condition were not met, the transfer would not be coercive. Of course, even if both conditions are met, a taking is not the only option; a private negotiated sale might be pursued instead if holdout problems were not anticipated. The point here is simply to specify the minimum conditions that might make a taking plausible.

Consider next Cell I, in which Ani does not yet own Parcel *X*, but her ownership would be both beneficial to society at large and privately beneficial to her. If market failures preclude Ani from acquiring Parcel *X* through normal channels, the government might confer ownership on Ani in these circumstances—a giving.[162] Thus, for example, property condemned through eminent domain may be reconveyed to a private party.[163] Notably, givings are not coercive insofar as the ownership interests they confer are either actively pursued—as is typically the case in the eminent domain context—or passively welcomed.[164] The collection of an associated payment for a giving may be coercive, however—a point that will be taken up below.[165]

The bottom row of Table 1 contains governmental ownership changes involving privately burdensome ownership. In Cell II, Ani does not own Parcel *X* and does not want to own it, but her ownership of the parcel would be socially beneficial. This convergence of privately burdensome but socially beneficial ownership describes circumstances in which forcings could become plausible.[166] To be sure, one might question whether there is much meaningful content in Cell II, or whether such privately costly new ownership is nearly always also socially costly; the point here is simply to specify the minimum conditions that would be necessary (but not sufficient) to justify a forcing.

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162. Because the focus here is on possessory ownership interests, my use of the term "giving" corresponds to Abraham Bell and Gideon Parchomovsky's category of "physical givings." See Bell & Parchomovsky, Givings, supra note 10, at 564, 567–69. Other governmental actions confer nonpossessory benefits on landowners, as where a new road or development facilitated by eminent domain provides positive externalities for nearby owners who were not displaced. See, e.g., id. at 551 (defining "derivative givings" as those in which "the state indirectly increases the value of property by engaging in a physical or regulatory giving or taking").

163. For instance, in the infamous *Poletown* case, the Michigan Supreme Court upheld the use of eminent domain to displace a close-knit neighborhood to provide an assembly plant site to General Motors. Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 459–60 (Mich. 1981), overruled by Cnty. of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004).

164. For example, one of the *Poletown* dissents stressed General Motors' involvement in soliciting Detroit's use of eminent domain to site its assembly plant. See id. at 466–70 (Ryan, J. dissenting).

165. See infra text accompanying notes 184–192.

166. Cell II focuses on instances in which a current nonowner would be compelled to become an owner. There is a shadow form of forcings—forced retention by a current owner—that will be incorporated into the analysis below. Infra note 170 and accompanying text.

Recognizing forcings suggests a fourth category shown in Cell IV, "relievings." Here, Ani owns Parcel *X* but does not want to own it anymore, and society does not want her to own it either. The fact that she continues to own the parcel under these circumstances suggests some legal or practical impediment has prevented markets from shifting ownership out of her hands. Thus, Ani's ownership of Parcel *X* is costly to herself and to society in a way that markets cannot address. Relievings would respond to this combination by lifting ownership and its associated burdens from an owner in Ani's position, at her request.

Each cell in Table 1 contains a misalignment between the socially optimal assignment of ownership and the ownership that actually exists. In Cells II and III, existing ownership aligns with private payoffs but misaligns with social payoffs. Government-imposed ownership changes to address these mismatches between private and social payoffs would operate coercively against an owner like Ani, whether by taking property away from her (Cell III) or forcing it on her (Cell II). By contrast, Cells I and IV present situations in which the existing ownership assignment fails to align with both social and private payoffs. Here, governmental action to realign ownership for the social good would also be privately beneficial to an owner like Ani, whether by giving her property that she wants or relieving her of property she does not want. Of course, carrying out such an action in favor of Ani may require coercion of some *other* owner or owners. Thus, a giving to one owner may be preceded by a taking from another,[167] and a relieving of one owner may be followed by a forcing of another.

B. *Ownership Alignments and Misalignments*

Table 1 focused exclusively on instances in which existing ownership diverged from the social ideal in ways that markets could not fix—conditions that presented the possibility of governmental action to reassign ownership. But where markets work well to produce socially valuable ownership and nonownership arrangements, the government has no interest in intervening. Table 2 adds two new columns to capture these (presumably ubiquitous) states of the world: one in which current ownership is socially beneficial and should not be altered, and a second in which a change in ownership would be socially costly and should not be brought about.

167. See Bell & Parchomovsky, Givings, supra note 10, at 564–74 & tbls.1–2 (examining ways in which takings and givings may be combined).

TABLE 2: ALIGNED AND MISALIGNED OWNERSHIP

	New Ownership by *A* Is Socially Beneficial	Current Ownership by *A* Is Socially Costly	Current Ownership by *A* Is Socially Beneficial	New Ownership by *A* Is Socially Costly
A's Ownership Is Privately Beneficial	I. GIVINGS	III. TAKINGS	V. ORDINARY OWNERSHIP	VII. BLOCKED ACQUISITION
A's Ownership Is Privately Costly	II. FORCINGS	IV. RELIEVINGS	VI. FORCED RETENTION	VIII. ORDINARY NON-OWNERSHIP

When these columns are added, two new misalignment possibilities emerge in which the government might play a role—this time to *maintain* existing ownership arrangements rather than to change them. The first is found in Cell VII, where ownership is desired by a would-be new owner, *A*, but is socially costly. Blocked acquisition is a potential response. For example, some property might be held entirely out of private hands in order to achieve social objectives, like preserving public access to navigable waterways.[168] In other cases, the law may apply more fine-grained eligibility criteria to screen out specific would-be owners whose ownership is predicted to be socially costly. For instance, laws prescribe eligibility requirements to acquire items such as alcohol, drugs, and firearms.[169] It is of course open to question whether any given limit on acquisition targets ownership that would actually be socially harmful; the point is only that blocked acquisition represents a possible response where ownership would be (in fact) socially harmful despite being privately valuable.

An additional misalignment emerges in Cell VI, where current owner *A* finds ownership privately costly, though it remains socially beneficial. Here, a potential governmental response is forced retention.[170]

168. See, e.g., Joseph D. Kearney & Thomas W. Merrill, The Origins of the American Public Trust Doctrine: What Really Happened in *Illinois Central*, 71 U. Chi. L. Rev. 799, 801–03 (2004) (discussing inalienability rule articulated in Illinois Central Railroad v. Illinois, 146 U.S. 387 (1892)).

169. See, e.g., Richard A. Epstein, Why Restrain Alienation?, 85 Colum. L. Rev. 970, 974–78 (1985) (discussing limits on sale of guns, alcohol, and drugs, including age requirements and other eligibility criteria).

170. Cell VI's forced-retention category represents a shadow form of the forcings (more precisely, forced acquisitions) represented in Cell II. Forced retentions are more

Alienability restrictions and bans on abandonment of real property offer real-world examples.[171] There is again an empirical question about whether the compelled prolongation of ownership produces social benefits in real situations, such that it is properly situated in Cell VI, or whether forced retention instead usually produces the sorts of social costs that might locate the situation in Cell IV, the proper domain of relievings. The goal here is simply to specify minimum conditions for the governmental response of forced retention, not to describe existing or proposed instances of forced retention.

Table 2's expanded matrix also includes two cases of complete alignment between private and social payoffs and ownership assignment. The first, found in Cell V, is ordinary ownership; here, current owner *A* finds ownership beneficial, and so does society. Cell VIII contains the opposite (but equally congenial) situation in which nonowner *A* views ownership of a particular property as costly, and society concurs. These two cells presumably contain the overwhelming majority of property arrangements in a well-functioning market economy. In such a system, the private and social payoffs to ownership are not independent of each other, aligning only by chance. Rather, the fact that a person values ownership enough to win it under such a system makes out a pretty good (although not airtight) case that her ownership will also be socially beneficial.[172] Similarly, the fact that one does not value ownership enough to win it under these same market conditions suggests that one's ownership is likely to impose social costs—at the very least, the opportunity cost associated with keeping the property out of the hands of a higher valuer. Thus, in the ordinary case of ownership, the social benefits largely flow from the very fact that the ownership is deemed privately beneficial; conversely, in the ordinary case of nonownership, the social costs of imposing ownership largely stem from its unwanted nature.

Why, then, would misalignments ever arise between the private and social costs or benefits of ownership? To ask the question is to suggest its answer: externalities. Underpinning the presumed correlation between private and social returns to ownership is an implicit assumption that the market system works with reasonable efficiency in assigning ownership to high valuers. Externalities undermine that assumption. Where ownership offers opportunities to offload costs on others—whether by engaging in land uses that have negative spillovers or strategically using one's ownership interest to hold out for more surplus—it may be privately beneficial

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heterogeneous than forced acquisitions because private and public acts and omissions can combine in innumerable ways to make it difficult as a practical or legal matter to terminate ownership.

171. See supra Part I.A.2 (discussing unwanted retention).

172. See, e.g., Chang, supra note 19 (manuscript at 10) ("Usually, current property owners are the ones who value their things the most, as they have already out-bid others in a market economy and acquired title.").

without being socially beneficial.[173] Likewise, ownership that is socially valuable may remain privately costly if the social benefits produced by ownership take the form of positive externalities that the owner cannot capture.[174]

It is the presence of externalities, then, that pushes real-world situations into the misaligned cells of Table 2, producing conditions in which governmental action to change or maintain ownership could become plausible. But the government actions outlined in Table 2 are not the only possible responses to misalignments in ownership. There are good normative arguments against employing forcings when less coercive alternatives exist, just as there are good normative arguments against resorting to takings when less coercive alternatives would do the job.[175] To define the space in which forcings might become normatively viable, then, it is first necessary to consider other measures that would help to move real-world situations out of the problematically misaligned cells and into the agreeable domains of ordinary ownership and ordinary nonownership.

The next Part will examine these alternatives in detail, but a few initial observations will help to set the stage. First, the question of whether *ownership* is socially beneficial or costly in the hands of a particular person must be kept separate from the question of whether that person deserves to bear a financial burden or enjoy a financial benefit. Because the government can impose payment obligations or bestow benefits without altering or influencing ownership at all, coercive actions to start, end, or protract ownership must be justified on other grounds—grounds that relate to the benefits or costs uniquely delivered by ownership itself. Conversely, the fact that someone does not deserve to bear a burden or receive a benefit should not necessarily *rule out* any of the governmental actions in Table 2, if the action is otherwise justified by its social benefits. This is because any of these governmental interventions into ownership arrangements can be accompanied by compensation flowing to or from the affected party.[176]

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173. In the case of negative spillovers, the reason for the mismatch between private and social payoffs is obvious: Owners are not internalizing all of the costs of an activity that produces private benefits for them. Where holdout problems are involved, it is the owner's bargaining behavior regarding the property (rather than her activities on the property) that produces externalities. See Lee Anne Fennell, Common Interest Tragedies, 98 Nw. U. L. Rev. 907, 928–29 (2004) (explaining that holdout behavior generates heightened bargaining costs and opportunity costs associated with thwarted deals, both of which partially fall on parties other than the holdout).

174. See, e.g., id. at 915–16 (discussing potential incentive misalignments produced by positive externalities).

175. Similar points might be made about forced retention and blocked acquisition.

176. To be sure, there are important questions about the adequacy and appropriateness of such compensation in particular instances. See infra Part V.B.2–3 (addressing these points).

Second, the discussion to this point has treated the private assessment of ownership's costs or benefits—the question of whether a situation falls in the top or bottom row of Tables 1 and 2—as a stable fact. But there are many things that the law can do to influence the attractiveness of ownership relative to nonownership—including (but not limited to) taxing it or subsidizing it.[177] Thus, ownership that produces social benefits may be encouraged rather than forced, and ownership that produces social harms may be discouraged rather than blocked or terminated. Such moves could change unwanted property to wanted (and vice versa), generating shifts between the rows in the tables above that would align private and social payoffs.

Third, whether ownership in a given set of hands produces costs or benefits to society may turn on any number of other policy choices surrounding ownership, including how land is regulated and how other nonpossessory interests—easements, covenants, and the like—are treated. By adjusting these elements, law can often change the column that a given situation resides within, turning socially costly ownership into socially beneficial ownership (by, for example, requiring a factory to control its emissions), or turning socially costly nonownership into socially beneficial nonownership (as by making the nonowner responsible for certain impacts through bonding mechanisms).[178]

Revisiting Table 2 with these observations in mind reveals three points relevant to forced ownership. First, many situations that might initially appear to reside in Cells II or VI—where ownership is privately aversive but socially desirable—may not really fit in those boxes at all if ownership itself, as opposed to the imposition of a particular payment obligation, adds no social value. Second, the law has at its disposal many means to move situations out of those cells, short of forcing ownership—whether by altering the private payoffs to ownership or refining ownership in ways that change its social payoffs. Third, some of these legal mechanisms, such as taxes and subsidies, may help to reveal which cell a particular situation actually resides within by eliciting information about how much a particular party desires ownership or nonownership. If society properly sets the price for entering into or ending ownership, *A*'s choice to pay and proceed demonstrates an alignment between her preferred ownership arrangement and the social optimum.[179]

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177. See infra Part IV.B (discussing repricing alternatives).

178. See infra Part IV.C (discussing stakes and bonds).

179. This amounts to a liability rule solution with respect to the ownership entitlement. See Calabresi & Melamed, supra note 6, at 1092 (distinguishing property rules from liability rules). Often, liability rules are used where the private benefits are unknown, as a way to elicit them and gauge whether they exceed the social costs. See, e.g., Louis Kaplow & Steven Shavell, Property Rules Versus Liability Rules: An Economic Analysis, 109 Harv. L. Rev. 713, 725–26 (1996) (noting information-forcing properties of liability rules).

IV. ALTERNATIVES TO FORCINGS

The ability of the government to collect and disburse funds, to tax and subsidize, and to otherwise alter the attractiveness of ownership raises doubts about the utility of forcings. Why would forced ownership ever dominate strategies like repricing ownership or simply collecting money from parties who have imposed negative externalities or enjoyed positive ones? This Part considers the scope and limits of these and other alternatives that fall short of compelling full-strength possessory ownership. Examining the efficacy and limits of these other approaches defines the space within which a forcings doctrine could add value.

As section A explains, society's goals often do not require ownership at all, but rather can be fully served by a collection mechanism that imposes normatively justified burdens. Section B examines pricing mechanisms, including auctions, that can bring about socially beneficial ownership without coercively imposing it on an unwilling owner. Section C considers alternatives that compel something short of full possessory ownership, such as mandating that individuals take stakes in a particular property or enterprise, or requiring them to accept downside risk through a bonding mechanism.

Two points are worth emphasizing at the outset. First, while these alternatives may seem less normatively objectionable than imposing full-strength possessory ownership outright, they are not necessarily immune to legal challenges based on interferences with property, autonomy, due process, or other interests. Second, because parties might at times prefer the imposition of full ownership over some of these alternatives, the fact that one of these alternatives fits the bill does not automatically rule out including involuntary ownership on a slate of choices extended to a party who will be subject to governmental action.

A. *Collections Distinguished*

The fact that it is normatively appropriate to impose a burden on a particular party does not establish, on its own, that the burden should take the form of an unwanted ownership interest. Externalities can often be addressed through systems of payments and collections. Mundane examples include the imposition of taxes, fees, and damages of various sorts when a party's actions cause impacts that her own property ownership interests do not automatically charge against her account. While collections are likely to be both aversive to the owner and coercively imposed by the government, they do not force the transfer of possessory ownership. Collections that accompany the *consensual* transfer of possessory property interests can also be distinguished from forcings. Thus, it is not a forcing when a voluntary purchase transaction is followed by a coercive action to collect payment for it, assuming the amount collected represents the agreed-upon purchase price.

Consider next remedial situations where a party is forced to purchase, say, the encroached-upon land of another. In this setting, the collection of payment is the aversive aspect of the forced transaction; the property itself has positive value (though by hypothesis, not as much positive value as the forced-purchase price). This situation counts as a forcing within the meaning of this Article even though the transfer of the possessory property interest mitigates rather than exacerbates the loss occasioned by the collection of the purchase price. Because the collection in such a case is part of an unwanted purchase transaction and finds its justification in the unsought transfer itself, it represents more than just a collection of funds. Moreover, the party's ongoing interaction with the transferred property will determine how much she gains or loses from the forced purchase, making it truly a case of imposed *ownership*, not just a forced collection.

A look at governmental givings helps to further illuminate the distinction between collecting funds and imposing ownership. Governmental actions can bestow benefits as well as impose burdens.[180] These benefits can take the form of physical grants of property to a party, or can instead flow from regulatory changes to a landowner's parcel or from governmental actions on nearby parcels that produce positive externalities for a given landowner.[181] Much of the givings literature focuses on the challenge of recapturing the windfalls that arise through these sorts of governmental actions.[182] Central questions involve when and how charges can be imposed for benefits conferred.[183]

Abraham Bell and Gideon Parchomovsky have focused on a number of features that they find relevant to the question of charging for benefits.[184] One of these features is what they term "refusability."[185] They note that a benefit that is forced on a recipient amounts to the exercise of a

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180. Indeed, unless governmental actions are imposed for no reason, they are necessarily accompanied by benefits that go to other parties. Takings thus imply givings. See Bell & Parchomovsky, Givings, supra note 10, at 550 ("Like a reflection in a mirror, the massive universe of takings is everywhere accompanied by givings.").

181. See id. at 551 (defining physical, regulatory, and derivative givings).

182. See, e.g., Windfalls for Wipeouts, supra note 10, at 15–27, 311–552 (discussing techniques for recapturing windfalls conferred on landowners and for using proceeds to compensate landowners who lose property value); Bell & Parchomovsky, Givings, supra note 10, at 577–618 (exploring why and how to apply charges to givings).

183. See, e.g., Rachelle Alterman, Land Use Regulations and Property Values: The "Windfalls Recapture" Idea, *in* The Oxford Handbook on Urban Economics and Planning 755, 766–75 (Nancy Brooks et al. eds., 2012) (providing multicountry examination of "betterment capture" levies and discussing some impediments to their implementation); Bell & Parchomovsky, Givings, supra note 10, at 590–604 (distinguishing chargeable from nonchargeable givings).

184. Bell & Parchomovsky, Givings, supra note 10, at 590–605.

185. Id. at 601–04.

put option—i.e., a forcing.[186] Noting the interference with autonomy that might be produced by the exercise of such options by the government,[187] they suggest that charges only apply after the individual has accepted the benefit, or after she has realized a gain associated with it (as upon sale of a benefited property).[188] Their first alternative, actual acceptance, fits well with the term "giving" insofar as it requires the recipient's consent (though perhaps it is better understood as "selling" since payment is demanded in exchange).

Bell and Parchomovsky's second alternative, the coerced collection of a realized gain,[189] sounds more like forced ownership. Yet in an important sense, it is not. As suggested above, the ownership strategy is crucially about responsibility for outcomes rather than expected values, and hence involves bearing risk.[190] If the government-installed improvement down the street from a given home is expected to generate $100,000 in added value for that home, then truly forcing a sale of that benefit stream would mean collecting now and letting the homeowner bear the risk that the actual value added will be higher or lower. Under Bell and Parchomovsky's approach,[191] this risk is not borne by the homeowner. Instead, she only disgorges the benefits that she actually realizes upon sale.[192] This has a financial impact on her, to be sure, but it does not require her to bear the risk of owning the outcomes. Nor does she hold any possessory interest in the government-installed property that would enable her to manage such outcomes. Thus, while collections of this sort edge very close to forcings, they remain distinguishable.

B. *Repricing (and Its Limits)*

Ownership in a particular party's hands may dominate a system of transfer payments if that party is better positioned to bear or influence the variance associated with potential outcomes.[193] This does not establish that ownership should be forced, however—it might instead be repriced. This is a different point than the one made in the previous section. The previous discussion established that monetary payments to or from the government can often be used to address externalities directly, without reassigning ownership. This would be the preferred path if own-

186. See id. at 602 ("The giving power, in this framework, is equivalent to a put option.").

187. See id. ("The reason to be even more cautious about givings than about takings is grounded in notions of autonomy.").

188. Id. at 603–04.

189. Id. at 608.

190. See supra Part II.A.

191. Bell & Parchomovsky, Givings, supra note 10, at 603–04.

192. See id. at 603 ("Our rule dictates that the charge for this nonrefusable benefit be deferred until its value is actually realized—for example, by sale of the property.").

193. See supra notes 92–93 and accompanying text (discussing link between ownership and risk bearing).

ership itself did not uniquely confer benefits. The discussion here assumes that ownership *does* uniquely confer benefits; the question is whether there are better ways to bring about changes in ownership without directly imposing those changes by fiat. The two points are linked, however, because governmental actions that internalize externalities may cause parties to change their minds about the value of ownership or nonownership. The difference goes to whether the focus is on using a technology other than ownership to address external impacts or on using a repricing mechanism rather than outright coercion to directly induce desired ownership patterns.

Repricing of ownership can be accomplished either through a system of financial inducements (taxes, penalties, subsidies, or other payments) or by altering in-kind aspects of the ownership package. The sections below consider these possibilities in turn.

1. *Paying for Ownership Choices.* — Monetary inducements or penalties can change unwanted ownership into wanted ownership, and vice versa, generating movement between the rows in Tables 1 and 2 above. This effect is easy to see where current ownership arrangements are beneficial to the owner but costly to society—a set of conditions where a taking might be contemplated. It is often possible to induce the owner to relinquish ownership voluntarily by offering a high enough price for the property; property that was initially privately beneficial becomes privately costly given the newly increased opportunity cost of holding onto it rather than selling. Or suppose a nonowner would find ownership privately beneficial, but that new ownership relationship will impose social costs. Rather than simply block acquisition, the government might attach Pigouvian taxes to the acquisition that would take account of the burdens it would impose.[194] If the tax is set correctly, it would change an ownership relationship that is only desired because of the cost-offloading opportunities it provides into an appropriately priced, and hence unwanted, ownership relationship.

Just as taxes or offers to purchase at an above-market price can turn wanted ownership into unwanted ownership, subsidies or offers to sell at a below-market price can transform property that would otherwise be unwanted by a nonowner into property that is wanted by its (new) owner—that is, a routine case of ordinary (albeit subsidized) ownership.[195] Government subsidies for homeownership are a familiar, if

194. See A.C. Pigou, The Economics of Welfare, pt. 2, ch. 9, §§ 13–17, at 192–203 (4th ed. 1932) (advocating taxes or subsidies to address divergence between private and social payoffs); see also Maureen L. Cropper & Wallace E. Oates, Environmental Economics: A Survey, 30 J. Econ. Lit. 675, 680 (1992) (describing Pigouvian taxes, which charge actors based on marginal cost of external harm inflicted).

195. See, e.g., Cropper & Oates, supra note 194, at 681–82 (discussing subsidies as alternative way to address external effects and noting some asymmetries in their operation relative to taxes).

controversial and empirically suspect, example.[196] Land transfers to private parties following the exercise of eminent domain also typically embed a valuable subsidy: The government supplies an assemblage of land that the private party could not aggregate as cheaply on her own, charges a below-market price for the property conveyed, or both.[197] Local governments also use a variety of other forms of subsidies and tax breaks to influence parties' development choices.[198]

The government may also offer low or even negative sales prices for real estate to induce purchase where demand is lacking. For example, Gary, Indiana, recently began selling vacant homes for just $1 to qualifying buyers,[199] and Detroit's former mayor introduced initiatives to provide forgivable loans and renovation funds to owners willing to buy vacant houses.[200] Financial inducements to continue ownership may also be used. For example, loan modification efforts spearheaded by the government effectively subsidize continued homeownership by borrowers who are unable to cover existing payments.

The fact that society can choose between taxes and subsidies (or combinations thereof) offers a great deal of flexibility to tailor solutions to fit distributive criteria. For example, instead of subsidizing continued ownership, the government could impose charges on parties who wish to end ownership where doing so will inflict costs on society.[201] As a practi-

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196. See, e.g., Satyajit Chatterjee, Taxes, Homeownership, and the Allocation of Residential Real Estate Risks, Bus. Rev. (Fed. Reserve Bank of Philadelphia, Pa.), Sept.–Oct. 1996, at 3, 4–6, available at http://www.phil.frb.org/research-and-data/publications/business-review/1996/september-october/brso96sc.pdf (on file with the *Columbia Law Review*) (detailing tax advantages of homeownership); see also, e.g., William G. Gale et al., Encouraging Homeownership Through the Tax Code, 115 Tax Notes 1171, 1171 (2007), available at http://www.urban.org/uploadedpdf/1001084_encouraging_homeownership.pdf (on file with the *Columbia Law Review*) (stating available evidence suggests mortgage-interest deduction "does little if anything to encourage homeownership" but rather "serves mainly to raise the price of housing and land and to encourage people who do buy homes to borrow more and to buy larger homes than they otherwise would").

197. See, e.g., David A. Dana, Reframing Eminent Domain: Unsupported Advocacy, Ambiguous Economics, and the Case for a New Public Use Test, 32 Vt. L. Rev. 129, 151 (2007) ("Eminent domain, the threat of it and the actuality of it, lowers the land-assembly costs developers otherwise would face, and in that sense the threat of eminent domain can be conceived of as a kind of subsidy to developers."); Daniel B. Kelly, The "Public Use" Requirement in Eminent Domain: A Rationale Based on Secret Purchases and Private Influence, 92 Cornell L. Rev. 1, 37–39 (2006) (giving examples of nominally priced or heavily discounted transfers to private parties following use of eminent domain).

198. E.g., Dana, supra note 197, at 151–52.

199. Steven Yaccino, A Chance to Own a Home for $1 in a City on the Ropes, N.Y. Times (Aug. 14, 2013), http://www.nytimes.com/2013/08/15/us/a-chance-to-own-a-home-for-1-in-a-city-on-the-ropes.html (on file with the *Columbia Law Review*).

200. Kamelia Angelova, Detroit Will PAY You to Take One of These 100 Abandoned Homes, Bus. Insider (Feb. 16, 2011), http://www.businessinsider.com/abandoned-houses-detroit-2011-2 (on file with the *Columbia Law Review*).

201. Combinations of taxes and subsidies could also be used where distributive considerations argue against using one or the other alone. For example, land that a party

cal matter, however, not all alternatives will be available in all cases. Judgment-proof parties will be unable to pay charges that are levied on them,[202] while governmental bodies may be unwilling or unable to pay reluctant parties to begin or continue socially valuable ownership.

Another complication is that the amount of benefit or harm that ownership does in a given instance may depend on the specific owner and how her ownership fits into larger ownership patterns, making pricing challenging. For example, studies show that clusters of foreclosures within close proximity of each other produce effects on nearby property values.[203] Consequently, the social benefits of addressing foreclosure spillovers through changes in ownership patterns might grow nonlinearly as the number of such foreclosures increases. Similarly, inducing ownership *here* may be more valuable than inducing ownership *there*, if a particular spatial pattern of ownership or nonownership is especially important to achieve or avoid.

Of course, it is not necessary that a repricing strategy be pursued across the board for a particular type of ownership; more tailored possibilities exist. For example, if it is essential that particular parcels pass into private ownership (or into new private ownership) without fail, then some kind of auction mechanism might be used for those parcels. The fact that a given parcel might have negative expected value presents no impediment; auctions can easily be used to allocate bads as well as goods. This point is readily illustrated by airline oversales procedures, which typically employ an informal auction mechanism to get sufficient passengers to accept the bad—a bump to a later flight.[204]

Repricing can also be tailored to attract a particular subset of potential owners. Thus, a subsidy program might be limited to people who are especially well positioned to take on a certain ownership obligation.[205] An

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already owns might be taxed more heavily if she fails to also acquire an adjacent parcel that is positioned in a manner that is difficult for any other owner to access, while the purchase of that adjacent parcel might also be subsidized. Together, the tax on nonacquisition and the subsidy for acquisition would total the social benefit associated with ownership, but the government would not have to cover the entire amount in the form of a subsidy.

202. Collecting a refundable payment in advance through a bonding mechanism offers one solution to this problem. See infra Part IV.C (discussing bonds as alternative to ownership).

203. See, e.g., Jenny Schuetz, Vicki Been & Ingrid Gould Ellen, Neighborhood Effects of Concentrated Mortgage Foreclosures, 17 J. Housing Econ. 306, 317 (2008) (finding close proximity to clusters of foreclosures, beyond certain minimum threshold, depresses sales prices).

204. See Inhaber, NIMBY, supra note 123, at 44–45 (classifying this approach as reverse Dutch auction, with increasingly larger amounts offered until enough takers are found).

205. In some cases, minimum financial requirements might be applied in an effort to ensure that the new owners will be able to adequately discharge their obligations. Yaccino, supra note 199 (reporting on Gary, Indiana's program for $1 home purchases, which requires buyers to "meet a minimum income threshold (starting at $35,250 for one

example of such selective repricing is found in "blotting" programs that allow homeowners to cheaply purchase city-owned vacant lots that adjoin their own residential parcels.[206] The program can be understood as an attempt to capitalize on complementarities that exist between an owner's current holdings and adjacent ones. The obligations of ownership over the vacant lot are likely to be self-enforcing; the owner lives next door and will personally suffer spillovers from any neglect. As a result, society can glean greater net benefits from the ownership arrangement.

The situations in which repricing is least likely to offer a complete solution mirror the situations that justify eminent domain: ones in which several complementary changes in ownership are necessary, and failure to achieve the full set torpedoes the chance for nearly all of the available social gains. In the takings context, offering a payment to a landowner whose privately beneficial ownership of a chunk of land stands in the way of a valuable highway assembly will not always be enough; holdout problems can interfere with the ordinary processes of buying and selling. Similarly, a nonowner's veto power might stand in the way of a desired pattern of ownership where that nonowner is especially well suited (given her other property holdings) to take on ownership of the parcel in question. But very often, desired ownership choices can be elicited through pricing, rather than by fiat.

2. *Adjusting the Ownership Bargain.* — There are many things that society can do to alter the relative attractiveness of ownership and nonownership beyond attaching taxes or subsidies to these choices. Innumerable regulatory policies, from zoning to mortgage regulation, impact private ownership choices. More foundationally, the way in which the ownership package itself is legally and socially constructed will influence whether individuals view it as worth taking on.[207] Of particular

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person) and . . . demonstrate the financial ability to bring the neglected property up to code within six months"). The Gary program also contains a feature in common with earlier homesteading enactments: Owners must live in the property for five years before they receive full ownership rights. Id.; see supra note 127 (discussing requirements of Homestead Act and rationales for them).

206. The term "blotting" comes from the contraction of "block lot." See David Lepeska, Is Blotting the Best Solution for Shrinking Cities?, CityLab (Nov. 10, 2011), http://www.citylab.com/housing/2011/11/blotting-good-or-bad-shrinking-cities/470/ (on file with the *Columbia Law Review*) (discussing blotting programs in several cities and attributing term to the Brooklyn planning and design firm Interboro); see also Kate Davidson, Blotting Update: Detroit Wants to Sell You This Lot for $200, Mich. Pub. Radio (Mar. 13, 2012), http://www.michiganradio.org/post/blotting-update-detroit-wants-sell-you-lot-200 (on file with the *Columbia Law Review*) (reporting on Detroit's blotting program); Adjacent Neighbors Land Acquisition Program (ANLAP), City of Chi., http://www.cityofchicago.org/city/en/depts/dcd/supp_info/adjacent_neighborslandacquisitionprogramanlap.html (on file with the *Columbia Law Review*) (last visited September 9, 2014) (describing Chicago's program).

207. The discussion here sets aside for the moment one aspect of property bundling that lies at the heart of this Article's analysis: the degree to which future ownership obligations (such as caring for the offspring of one's cow) are involuntarily bundled with

interest for this discussion are the ways in which adjusting the overall ownership package could differentially attract or repel owners whose ownership would be more or less likely to add social value.

Suppose, for example, that widespread, small-scale property ownership by individuals and households produces social value that exceeds that which can be produced through large, consolidated blocks of ownership.[208] If such small-scale owners are in a poor position to bear risk, then adjusting the risk that owners must bear, whether through changes in tenure forms or other policy initiatives, could encourage their participation in ownership. Where the relevant risks are amenable to the owner's control, in whole or in part, responsibility for outcomes can help to align incentives—a social benefit. But exposure to risks that an owner has little ability to control, such as those produced by local land use choices or changes in the local housing market, does not serve this function.[209] Unless the exposure in question is doing something else, such as adding diversification or hedging against specific other risks that the owner faces,[210] it represents a gamble that the owner may not desire and may be in a poor position to bear. Improving the capacity to slice off and neutralize uncontrollable risks is one way to make the overall ownership bargain more attractive to risk-averse owners.[211]

Other aspects of the ownership bundle influence the attractiveness of private property ownership as well. The law must make tradeoffs between the freedom afforded individual owners to engage in uses of their own choosing and the goals of the community (including protecting landowners from the uses of others). The way in which this balance is struck will carry different consequences for different potential owners. Likewise, the ease or difficulty with which ownership can be

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earlier, voluntarily acquired property interests (such as the original cow). This issue will be taken up below. See infra Part V.B.2. Although these bundlings can indeed make voluntary ownership more or less attractive, they arguably represent examples of forcings rather than alternatives to them.

208. See infra note 266 and accompanying text (discussing costs of consolidated ownership).

209. See, e.g., Fennell, Homeownership, supra note 111, at 1061–62 (distinguishing home-equity risks that lie under homeowner's control from those that do not).

210. See, e.g., id. at 1053–54 (noting home-equity risk might be used to hedge risk associated with future home purchase in same market or correlated market); Lu Han, The Effects of Price Risk on Housing Demand: Empirical Evidence from U.S. Markets, 23 Rev. Fin. Stud. 3889, 3890 (2010) ("[I]f the price of a future house is positively correlated with the price of the current house, the household may make an earlier or larger home purchase in order to offset future housing cost risk . . . .").

211. If, conversely, one believed that large-scale ownership tended to produce more social value than small-scale ownership, and if large-scale owners were better positioned to bear risk, then bundling substantial risk-bearing with ownership would tend to select for large-scale owners.

overridden through eminent domain will influence its value for prospective owners.[212]

To be sure, ownership's attractions, at least for individual households, often run deeper than the allocation of risks and benefits. Ownership may simply push the right psychological buttons. Yet the way the ownership relationship is understood and valued depends on the way in which it is framed.[213] There are cultural factors at work as well, along with advantages that may be largely contingent on particular legal and social features.[214] For example, homeowners in the United States tend to enjoy much greater security of tenure than renters—but this is not inevitable.[215] Thus, the relationship between private and social benefits is mutable, and different motivations for ownership may also resonate with different sorts of would-be owners. Recalibrating the ownership package thus offers an additional way to address or arrest misalignments between private and social payoffs to ownership. But, like other forms of repricing, it cannot always address instances where ownership by specific parties would be uniquely valuable.

C. *Bonds and Stakes*

Ownership's distinctive social value comes from its capacity to place actual outcomes on owners. Full possessory ownership does this in a particular way, by automatically imposing those costs or conferring those

212. Although fear that eminent domain will displace owners with high subjective value is frequently the focus of analysis, the way in which a society uses condemnation could also influence the calculations of risk-seeking or optimistic owners who hope their parcels will one day become integral to a large and valuable development assembly. The well-known potential of holdouts to thwart or raise the costs of land assemblies makes it highly speculative to what extent any such owner could reasonably expect to reap an unusually large surplus. Nonetheless, the chance at such a bounty is doubtless attractive to some potential owners. This motive for ownership is diminished if eminent domain stands ready to step in. The normative valence of holding out for more than one's true reservation price in an effort to glean surplus from another party is a subject of much debate. Compare Larissa Katz, Spite and Extortion: A Jurisdictional Principle of Abuse of Property Right, 122 Yale L.J. 1444, 1468 (2013) (characterizing party who stood on his exclusion rights as "hold[ing] the developer up for ransom"), with James E. Krier & Stewart J. Schwab, Property Rules and Liability Rules: The Cathedral in Another Light, 70 N.Y.U. L. Rev. 440, 465–67 (1995) (critiquing characterization of holdouts as extortionists).

213. Recent empirical work has explored how people perceive ownership and the extent to which those perceptions are malleable. See, e.g., Jonathan Remy Nash & Stephanie M. Stern, Property Frames, 87 Wash. U. L. Rev. 449, 456 (2010) (finding, in study involving first-year law students, that altering framing of hypothetical property rights in laptops "changes expectations regarding the strength of property rights and reactions to subsequent regulation").

214. See, e.g., Fennell, Homeownership, supra note 111, at 1058–59 (discussing cultural primacy of homeownership).

215. See, e.g., id. at 1054–57 (noting sources of tenure insecurity for tenants and possibility these factors could be addressed by longer-term or otherwise more tenant-protective leases).

benefits that (literally) come with the territory. It is an especially suitable strategy where it is easier to define and contain the set of relevant outcomes by placing physical borders around a resource than it is to enumerate and separately contract over the relevant inputs or outcomes.[216] But physical boundaries can be both overinclusive and underinclusive in channeling relevant outcomes to the accounts of owners. For this reason, physical possession and exclusion rights are not sufficient to fully align incentives. And, importantly for the present discussion, physical possession is not always necessary to address incentive problems either.

One facet of this point was made above in observing that taxes, fees, and damages can be used to align incentives.[217] However, these monetary impositions are often based on expected rather than actual outcomes, for reasons that relate to administrability. Yet sometimes it is possible to isolate and track actual outcomes as they unfold over time, and to charge those actual outcomes to a party without making that party a possessory owner. Thus, various forms of bonding and stakeholding can often achieve the beneficial effects of compulsory ownership without actually compelling full possessory ownership.

Consider laws that mandate the advance posting of bonds. The basic idea can be illustrated by bottle deposits: The upfront payment for the bottle is designed to cover the social costs of its improper disposal, but that payment can be recovered if the bottle is returned.[218] The risk of an improper disposal is thereby shifted to the bottle's owner, who holds a put option to sell the bottle back in recyclable condition.[219] While the bottle deposit operates in a binary way—if you return the bottle, you get the full deposit back—bonding mechanisms could instead look to observable indicia of actual outcomes (water quality or air quality, for example) to determine how much of a given bond will be returned.[220]

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216. See supra notes 88–91 and accompanying text (discussing Smith's formulation of property's "exclusion strategy").

217. See supra Part IV.B.1.

218. The bottle deposit is an intuitive example, but the approach has been generalized. E.g., Peter Bohm, Deposit-Refund Systems: Theory and Applications to Environmental, Conservation, and Consumer Policy (1981); Don Fullerton & Ann Wolverton, Two Generalizations of a Deposit-Refund System (Nat'l Bureau of Econ. Research, Working Paper No. 7505, 2000), available at http://www.nber.org/papers/w7505.pdf (on file with the *Columbia Law Review*). Edwin Mills and Robert Solow are credited with laying the intellectual foundations for this approach. See Edwin S. Mills, Urban Economics 259–60 (1972) (describing refundable "materials disposal tax"); Robert M. Solow, The Economist's Approach to Pollution and Its Control, 173 Science 498, 502 (1971) (proposing refundable "materials-use fee").

219. See Robert Costanza & Charles Perrings, A Flexible Assurance Bonding System for Improved Environmental Management, 2 Ecological Econ. 57, 59 (1990) (explaining bottle-deposit system switches presumption so that "user absorbs the risk" of environmentally damaging disposal).

220. The bonding idea has even been extended to social policy objectives, with payouts tied to the achievement of certain social goals or improvement along particular metrics. E.g., Ronnie Horesh, Injecting Incentives into the Solution of Social Problems:

Nicolaus Tideman has suggested that this approach could be applied to abandoned land.[221] The fact that it can be costly to restore derelict land to a marketable state makes abandonment problematic, at least without some accompanying payment.[222] But suppose landowners were required to pay an amount up front sufficient to cover these costs whenever they added structures or other improvements to the land, or engaged in uses that might impact the land's future marketability. Then it would be possible for the state to offer a rebate to those who chose to voluntarily relinquish their land in good condition (e.g., free of dilapidated structures, without latent dangers in the yards and driveways, and without environmental hazards requiring remediation).[223] Even if the property had some problems, the associated costs could simply be deducted from the rebate, just as damages to a rental unit are deducted from the security deposit.

Bond posting shifts risk, along with the burden of proof, to the party posting the bond.[224] In the example just given, the bond could enable a clean exit from ownership. Bonds could also stand in for possessory ownership. A party who is thought to occupy an especially good position to bear some risk or influence some result (but who does not need to be in physical possession of a particular piece of property to do so) could be required to post a bond that will be returned in whole or in part depending on actual outcomes. Thus, instead of requiring a new factory to buy up the properties of the surrounding homeowners, the factory owner might merely be required to post a bond that would be sufficient to cover

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Social Policy Bonds, Econ. Aff., Sept. 2000, at 39 (proposing Social Policy Bonds and outlining how they would work); OMB, Paying for Success, White House, http://www.whitehouse.gov/omb/factsheet/paying-for-success (on file with the *Columbia Law Review*) (last visited September 9, 2014) (describing Pay for Success Bonds, which base funding on outcomes); John Roman, Social Impact Bonds: A New Model to Reduce Blight, Huffington Post (Nov. 6, 2013, 12:15 PM), http://www.huffingtonpost.com/john-roman-phd/social-impact-bonds-a-new_b_4214851.html (on file with the *Columbia Law Review*) (reporting on use of social impact bonds by local governments and suggesting their potential as antiblight measures).

221. T. Nicolaus Tideman, Integrating Land-Value Taxation with the Internalization of Spatial Externalities, 66 Land Econ. 341, 346 (1990) (suggesting "any person who transformed a site in a way that made it expensive to restore that site to a condition of 'bare land' could be required to post an interest-bearing bond that would run with the land" to address the contingency of future abandonment). Tideman contemplated using this approach in conjunction with a land-tax proposal that would create incentives to strategically abandon land, id., but it could be applied whenever society stands to suffer from the spillovers of abandonment.

222. Such a payment might be made in kind. See Strahilevitz, Right to Abandon, supra note 7, at 419 ("An owner seeking to abandon land should be able to do so upon cleaning up or improving the property sufficiently to give it positive market value.").

223. Making these deposits run with the land would allow expected rebates to be capitalized into negotiated resale prices as well.

224. E.g., Costanza & Perrings, supra note 219, at 59, 65–69.

the "worst case scenario" effects of its noise, effluents, and vibrations.[225] This bond, or a portion of it, could be returned after a period of years based on objective measures of these impacts, or of their derived impacts on home values.

Posting a bond is one way of linking one's own payoffs to future states of the world, and thereby bearing risk and accepting responsibility. The idea can be broadened to all forms of "taking a stake" in a particular property interest, enterprise, or outcome. While owners of possessory interests are obviously stakeholders, it is possible to hold a stake without being in physical possession.[226] Where achieving a social goal depends on the incentive and risk allocations associated with financial stakes, but where the incentives in question can operate without being in physical possession, mandatory stakeholding can be an alternative to full-strength forced ownership.

Although the idea of forced stakeholding sounds unusual, there are antecedents in private contracting behavior. A recent example is Apple's announcement that CEO Tim Cook will be required to hold ten times his base salary in shares.[227] If a person or entity is thought to be especially well positioned to determine whether an enterprise succeeds or fails, a required stake in the enterprise might be expected to powerfully harness incentives.[228]

The model could, in theory, be extended to governmental impositions of ownership stakes. A recent proposal by Gideon Parchomovsky and Endre Stavang would do just that, in an effort to leverage support for environmental initiatives.[229] Because stakeholding can be extended to

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225. See id. at 58–59 (describing environmental bonds "designed to confront individual resource users with the marginal social costs of the 'worst case' results of their activities at the time those activities are undertaken").

226. Investors can, for example, hold an equity stake in real property through a derivative instrument or other equity-sharing arrangement. See, e.g., Fennell, Homeownership, supra note 111, at 1048–49 & nn.4–5, 1064–70 (describing several such approaches and citing related literature).

227. Adam Satariano, Apple Requires CEO Cook to Hold 10 Times Salary in Stock, Bloomberg (Mar. 1, 2013, 8:02 PM), http://www.bloomberg.com/news/2013-03-01/apple-requires-ceo-cook-to-hold-10-times-salary-in-stock.html (on file with the *Columbia Law Review*). Other senior executive officers at Apple are required to own shares equal to three times their base salary. Id.

228. See David M. Schizer, Executives and Hedging: The Fragile Legal Foundation of Incentive Compatibility, 100 Colum. L. Rev. 440, 443–44 (2000) (explaining how stock options provide incentive compatibility, absent hedging).

229. See Gideon Parchomovsky & Endre Stavang, The Environmental Option, 99 Minn. L. Rev. (forthcoming 2014) (manuscript at 3), available at http://www.cree.uio.no/publications/2013_3/Stavang_The_Environmental_Option_CREE_WP3_2013.pdf (on file with the *Columbia Law Review*) (presenting proposal in which firms would be effectively required to hold futures in "green" enterprises). Although the authors call the interest that the firm is required to buy an "option," it is better described as a future; the firm is forced to buy shares from the green enterprise at a set price by a specified future date, "even at a loss." Id.

parties beyond those in physical possession, it offers a flexible alternative to co-ownership for parties whose holdings mutually spill over onto each other's. Indeed, the semicommons arrangement in medieval common fields can be understood as a blunt-force way of compelling owners of farming strips to take a stake in the fate of the field as a whole, and not just a segregable corner of it.[230] A conceptually similar approach might be extended to communities and neighborhoods.[231]

By taking a stake in an outcome, a party effectively places a bet on it; she then has an incentive to influence the outcome of that bet. Allowing multiple parties to take stakes in a single outcome opens up the possibility of elegant solutions to otherwise intractable incentive dilemmas.[232] When more than one party can influence a given outcome, assigning the upside or downside risk to only one of them will weaken the incentives of the others. Various ways of splitting up gains and losses are possible, but each comes with drawbacks. Mechanisms that allow each party to bear the full risk associated with her inputs can help to align incentives.[233]

The fact that certain arrangements help to align incentives does not necessarily make out a case for *mandating* them. Parties might be expected to opt into beneficial stakeholding arrangements. But there are at least two reasons why it might be helpful to keep the idea of mandatory stakeholding on the slate of possible alternatives.

First, temporarily mandated (or even just subsidized) stakeholding could help to generate an initial critical mass to support the development of voluntary stake-taking markets. Consider, for example, the idea of having local residents buy shares in new developments. This "crowd-

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230. In the medieval common-field arrangement, each individual farmer owned a number of strips of land scattered throughout a field that was seasonally turned into a grazing commons. See generally Smith, Semicommon Property, supra note 153 (describing this arrangement and positing that it was designed to prevent strategic use of the commons to benefit one's own farmland or burden that of others).

231. See Lee Anne Fennell & Julie A. Roin, Controlling Residential Stakes, 77 U. Chi. L. Rev. 143, 174–75 (2010) (sketching model in which neighboring jurisdictions would be required to buy some amount of securities indexed to each other's local property values).

232. See, e.g., Robert Cooter & Ariel Porat, Anti-Insurance, 31 J. Legal Stud. 203, 204 (2002) ("When several actors affect a risk, efficient incentives require each of them to bear the full risk."); Robert Cooter & Ariel Porat, Total Liability for Excessive Harm, 36 J. Legal Stud. 63, 64 (2007) (proposing rule that would "hold each participant in the activity responsible for all of the excessive harm that everyone causes" where excessive harm is defined as "difference between the total harm caused by all injurers and the optimal total harm").

233. See, e.g., R.H. Coase, The Problem of Social Cost, 3 J.L. & Econ. 1, 41 (1960) (proposing "double tax system" for both sides of a land use conflict); Robert Cooter, Unity in Tort, Contract, and Property: The Model of Precaution, 73 Calif. L. Rev. 1, 3–4 (1985) (presenting idea of "double responsibility at the margin"). Care must be taken in structuring these arrangements to avoid creating other distortions, however. See Nuno Garoupa & Chris William Sanchirico, Decoupling as Transactions Tax, 39 J. Legal Stud. 469, 469–72 (2010) (characterizing legal rules structured to incentivize both plaintiff and defendant as transactions tax that reduces joint payoffs).

funding" idea has been floated as an antidote to NIMBYism.[234] If all homeowners in a particular residential area were automatically endowed with a small stake in the neighboring commercial district, collective action in support of optimal development could take hold in a way that might not be possible if households could selectively opt in or out.[235] Ultimately, the development of new stake-taking alternatives could facilitate greater risk customization opportunities than the status quo affords.[236]

Second, stakeholding might be considered as either an alternative to or an adjunct to other forms of governmental coercion. Not only might it offer a less intrusive alternative in contexts where forced ownership is currently used or contemplated, it could also be creatively combined with other property incursions in some contexts. For example, Eric Posner and Luigi Zingales have proposed combining mandatory write-downs of underwater mortgages with grants of a share of upside appreciation potential to the affected lenders.[237] Likewise, some land readjustment approaches grant displaced parties shares in the new enterprises that their displacement enabled.[238] In these examples, the granted stake would presumably serve to mitigate a coercively imposed burden and hence would not be aversive on its own, but it would nonetheless form part of a compelled transfer.

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234. See Matthew Yglesias, The Real Estate Crowdfunding Scheme that Could Revolutionize Urban Policy by Defeating NIMBYism, Slate (June 5, 2013, 2:43 PM), http://www.slate.com/articles/business/moneybox/2013/06/fundrise_real_estate_crowd_funding_could_beat_nimbys.html/ (on file with the *Columbia Law Review*) (describing and critiquing this approach).

235. Similarly, tenants in gentrifying areas might be required to hold securities that are indexed to property values—another stake-realigning move that could reduce resistance to certain kinds of community changes. See Brendan O'Flaherty, City Economics 369 (2005) ("Tenants could get a long-run stake in the community if they were required to buy some variety of security that was pegged to the town's or neighborhood's total property value."); see also Robert I. Lerman & Signe-Mary McKernan, Promoting Neighborhood Improvement While Protecting Low-Income Families, Opportunity & Ownership Project (Urban Inst., Washington, D.C.), May 2007, at 1, 2–3, available at http://www.urban.org/UploadedPDF/311457_Promoting_Neighborhood.pdf (on file with the *Columbia Law Review*) (proposing tenants be provided with financial instruments indexed to area rents); Fennell & Roin, supra note 231, at 165–71 (exploring how such an approach might be designed).

236. It might seem counterproductive to add more risk to a homeowner's bundle, given that homeowners already bear significant local housing market risk that they cannot readily shed. See supra notes 209–210 and accompanying text (discussing home-equity risk). New risk-bearing arrangements might, however, help to counter some of the risks that are currently built into the homeowner's default bundle—as by countering risk-averse concerns about property values with a chance to share in the gains of new local development. More broadly, making markets in risk more robust and familiar could speed the development of new forms of homeownership that would unbundle certain risks that lie outside the homeowner's control.

237. Eric Posner & Luigi Zingales, A Loan Modification Approach to the Housing Crisis, 11 Am. L. & Econ. Rev. 575, 589–92 (2009).

238. See supra note 25 and accompanying text (discussing land readjustment).

When considered in conjunction with the other alternatives to forced ownership discussed above, the possibility of stakeholding further refines and limits the conditions in which an outright forcing would dominate. Rather than viewing these mechanisms as falling completely outside of the domain of forcings, however, it may be more useful to see them as specialized instantiations of it, where the ownership interest in question is narrowly defined to comprise a certain set of outcomes.[239]

V. THE USE AND MISUSE OF FORCINGS

The alternatives surveyed in the previous Part demonstrate that societal objectives associated with ownership can generally be fulfilled without the government forcing full-strength possessory ownership on an unwilling owner. Forcings are rare, and this is as it should be. But pulling apart the rationales for compulsory ownership raises questions about whether forcings are used in all, and only, those situations where they could uniquely add value. Section A considers some concrete examples of how forcings might be extended. Section B explores how a doctrine of forcings might be formulated and cabined. Section C rethinks existing forms of forced ownership and briefly explores the domain of relievings, which can offer a safety valve for socially costly unwanted ownership.

A. *Extending Forcings*

Could forcings serve a policy function analogous to (if more limited than) eminent domain? Just as eminent domain represents a call option held by the government, a forcing represents a put option that is held by the government.[240] We might initially wonder why resorting to such an alternative would ever be necessary, given the potential to reprice ownership or to identify willing owners through an auction process. Unlike potential sellers, who may hold a spatial monopoly on a sought-after parcel, potential buyers are rarely in a similarly unique position.[241] They can compete against each other even when the interest in question

239. The offloading of risk can be conceptualized as the division of ownership. See Barzel, supra note 92, at 6–7 (characterizing party who contracts to provide service for photocopier as "a residual claimant from the servicing operation" and hence a partial owner of the copier). By this logic, mandatory elements of risk embedded in existing ownership forms represent a type of forcing, and government action to facilitate the shedding of risk represents a type of relieving.

240. See supra note 6 (defining call and put options in finance and law).

241. See Richard A. Epstein, A Clear View of the Cathedral: The Dominance of Property Rules, 106 Yale L.J. 2091, 2093 (1997) ("The holder of cash has no monopoly position at all, so it is very hard to believe that by allowing the present holder of some specific asset to designate the person who must take it off his hands, we advance any conceivable measure of social welfare.").

carries negative value, as airline passengers do in the context of oversold flights.[242]

Sometimes, however, potential buyers also have monopoly power.[243] Encroachment and accession cases offer simple examples where restoring unified ownership in complementary goods requires either a purchase or a sale between two specified parties.[244] Similarly, the government might wish to produce a particular spatial pattern of land ownership that packages together complementarities or that disperses ownership among existing landholders in specified ways.[245] Just as the government is not always able to buy up the aggregated patterns of land necessary for certain public projects through purely voluntary transactions, so too may it sometimes encounter difficulty getting existing owners to take up ownership in particular patterns, where doing so is necessary to achieve some social goal.

As this analysis suggests, the most likely scenarios for normatively justified forcings would involve complementarities between an owner's current properties and related or adjacent properties that she does not yet own. Her current holdings may make related or adjacent properties difficult for another party to effectively manage, so that if she goes on owning what she currently holds, it is efficient for her to take on ownership of the other property as well. By way of illustration, consider the following ways in which this idea might be applied to generate new forms of forcings.

1. *Alternatives to Eminent Domain.* — In some instances, a forcing could be presented to the owner as an alternative to eminent domain. To see the niche that a forcings approach might fill, it is first helpful to step back and consider what eminent domain accomplishes for society. It does not just aggregate together the parcels of land necessary to accommodate uses like highways or urban redevelopment. It also consolidates ownership of that land.[246] But why? Lloyd Cohen provocatively explores

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242. See, e.g., Inhaber, NIMBY, supra note 123, at 44–46 (describing airline reverse auction and recommending applying its principles to other bads, such as waste facility siting); see also supra notes 123, 204 and accompanying text (discussing auctions to allocate bads).

243. See Ayres, supra note 6, at 19–20 (observing that both buyer and seller have monopoly power when the two are locked in a bilateral monopoly situation).

244. See supra notes 17–19 and accompanying text (discussing these examples).

245. For example, in an effort to combat blight, the government might want to make sure all homes are occupied on a given block. Or, to make a developer internalize the cost of infrastructure improvements, a local government might require her to own land sufficient to encompass the minimum efficient scale for a new arterial road. The reason for actually requiring ownership in the latter case rather than simply imposing an impact fee might be uncertainty about the extent, type, and cost of infrastructure that would be required, which might depend in some measure on aspects of the developer's project that are difficult to specify in advance.

246. See Abraham Bell & Gideon Parchomovsky, Reconfiguring Property in Three Dimensions, 75 U. Chi. L. Rev. 1015, 1020 (2008) [hereinafter Bell & Parchomovsky,

this question in his analysis of holdouts.[247] He posits that if there were no transaction costs, holdouts would not be a problem because they could simply retain separate ownership.[248] The would-be holdout could continue to own, say, an area within the footprint of a newly developed department store, which he could seamlessly operate as part of the store.[249]

Given the costs of coordination and monitoring, however, the idea breaks down—owners of store fragments could harm each other and benefit themselves with impunity.[250] The corner holdout might steal merchandise from, or toss garbage into, the other portion of the store, or he might simply invest too little in improving the store's reputation, given that he will reap only a fraction of the benefits. These are, of course, standard "tragedy of the commons" arguments against dividing or sharing ownership in certain ways.[251] The key point is that the allocation of ownership itself matters, given the costs of delivering access to resources. And eminent domain is a well-known method for overcoming the holdout problems that impede achieving unified ownership in situations where aggregation of separate holdings is necessary. But it is not the only way to achieve such an aggregation.

Suppose, for example, that our department-store holdout were given a choice between having his property condemned through eminent domain or buying out the developer's assembled land holdings instead.[252] A landowner who placed a high value on retaining possession of his portion of the property could elect the purchase option. Presumably, the opportunity cost of underutilizing a large consolidated holding

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Reconfiguring] ("A three-dimensional analysis recognizes that the problem [of land assembly] may be viewed in several ways: too many owners, too small assets, or too much dominion (power to hold out).").

247. Lloyd Cohen, Holdouts and Free Riders, 20 J. Legal Stud. 351 (1991).

248. See id. at 353 (observing that no property would need to change hands to coordinate use in zero-transaction-cost world).

249. Id.

250. See id. at 354 (noting preclusive effect of these costs).

251. See, e.g., Garrett Hardin, The Tragedy of the Commons, 162 Science 1243, 1244 (1968) (giving example of a grazing pasture in which costs of individual herders' decisions to add grazing animals are shared among all herders). Not all common-ownership schemes end in tragedy, of course. See, e.g., Ostrom, supra note 152, at 58–102 (examining enduring common-pool resource institutions and identifying design principles associated with them).

252. Such an approach resembles the sets of remedial choices offered to parties in encroachment and accession cases. See supra notes 17–19 and accompanying text. Depending on the assessment method used to determine the compensation level and the buyout price, the model might also resemble certain techniques for dividing property held in common. Under the "Shotgun" approach to business dissolution, for example, one party states a value for shares of the business and the other party can choose to either buy out or be bought out at that price. See, e.g., Claudia M. Landeo & Kathryn E. Spier, Irreconcilable Differences: Judicial Resolution of Business Deadlock, 81 U. Chi. L. Rev. 203, 205–06 (2014) (describing Shotgun mechanism and citing related literature).

would prompt an owner to employ the property in what society would regard as its highest and best use. But if he did not, he would bear the associated cost.

2. *Mandating Development Bundles.* — Purchases might also be compelled where eminent domain is not in play. For example, in a case of purely private development, the government might wish to place more property under one owner's control than would be independently selected by the developer, perhaps to generate positive externalities for the surrounding area. Similarly, a local government might address the concerns of the surrounding community by allowing residents or businesses to force purchases of their properties on developers who would transform an area in ways that would make them wish to leave. Indeed, the government could extend such an option to local residents in conjunction with its own proposed exercises of eminent domain, allowing nearby landowners who were not part of the original condemnation plan to compel the government to buy up their properties as well.[253]

Unwanted properties could also be bundled into larger packages that buyers, such as developers, would find attractive, and offered on an all-or-nothing basis. Land banks capable of consolidating large blocks of ownership for conveyance could prove instrumental in such a strategy.[254] Easing land assembly represents a valuable subsidy that might induce developers to accept problematic properties and their associated liabilities as part of larger packages that also contain some desirable properties. By controlling the size and configuration of the entire bundle, such an approach can channel property to buyers who are in a good position to absorb or remediate the potential negative spillovers that would otherwise be associated with individual problematic lots.

3. *Owning Consequence Zones.* — Scholars have already examined how put options might be used in place of other nuisance remedies.[255] However, the analysis has typically focused on the question of being forced to buy an entitlement to, say, emit pollutants.[256] A different model would

253. See Bell & Parchomovsky, Reconfiguring, supra note 246, at 1064–65 (discussing possibility eminent domain might at times take too little property rather than too much).

254. See, e.g., Jon Hurdle, Philadelphia Forges Plan to Rebuild from Decay, N.Y. Times (Dec. 31, 2013), http://www.nytimes.com/2014/01/01/realestate/commercial/a-land-bank-is-forged-for-decaying-blocks-in-philadelphia.html (on file with the *Columbia Law Review*) (reporting on Philadelphia Land Bank's plans, which include consolidating ownership of blocks that would be attractive to developers).

255. See, e.g., Ayres, supra note 6, at 29–37 (describing how put options might be incorporated into nuisance law).

256. See, e.g., id. at 29 (discussing possibility of "forcing the defendant to purchase the prospective nuisance right"). It is unclear whether a polluter could be *required* to purchase an ongoing emission right. See Epstein, Protecting Property, supra note 19, at 843 (observing that defendant cannot be forced to continue polluting and suggesting only temporary damages could be imposed on defendant who elected to shut down instead). If permanent damages were available, however, this could be conceptualized as forcing the polluter to buy a limited property interest in the affected property. See Boomer v. Atl.

involve the compulsory purchase of the affected property itself, triggered by the initial pollution decision. Rather than face liability for particular consequences or pay in advance for expected impacts, landowners could be required to own "consequence zones"—physical places where those impacts are realized. For instance, residents who are bothered by a nearby factory could be given the option to force the sale of their fee simple interests to the factory. At that point, the polluter could decide whether to continue polluting what is now her own land, or shut down her operations instead. Under certain circumstances, forcing the sale of the fee interest might offer advantages over the more well-studied model of forcing the sale of just the entitlement to emit.

First, in cases where there is sharp disagreement about the actual impacts that will be realized over time, a transfer of ownership may offer *both* parties a more acceptable solution than permanent damages based on an expected value.[257] Second, putting ownership into the same hands avoids the kinds of incentive problems going forward that have been raised in the permanent damages context.[258] A polluter who has already paid permanent damages may not innovate to reduce harm even when it could be done cost effectively, but a polluter who owns the land that will be polluted would retain that incentive.[259] The solution is also better incentive-wise than a series of damage judgments over time that would reflect realized harm, at least to the extent that the victims in the story could influence the impacts that they will suffer. A single owner will pursue whichever alternative offers the highest payoff, whether taking precautions on the adjacent land, adding scrubbers to the factory, or doing nothing at all.[260]

Consequence-zone ownership need not invariably be imposed on the party that desires the more active or invasive use. It would also be possible to make the party with a complaint about a neighbor's use buy up that neighbor's property. New Jersey's conditional variances, in which

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Cement Co., 257 N.E.2d 870, 875 (N.Y. 1970) (characterizing permanent damages awarded in case as placing servitude on affected land).

257. While it might seem that one party is bound to be wrong, the ability of parties to influence outcomes can turn the game into a positive-sum one. Another approach to uncertainty about impacts is to use a bonding mechanism that provides refunds based on actual results, as discussed above. See supra Part IV.C.

258. See *Boomer*, 257 N.E.2d at 876 (Jasen, J., dissenting) ("[O]nce such permanent damages are assessed and paid, the incentive to alleviate the wrong would be eliminated, thereby continuing air pollution of an area without abatement.").

259. As with all other inefficiencies, the shortfall in postpayment innovation is the product of positive transaction costs. See Coase, supra note 233, at 8 (observing value-maximizing result will be reached regardless of how legal entitlements are assigned "if the pricing system is assumed to work without cost"). If the residents could costlessly bargain with the factory to invent a better pollution stopper, this would occur. But of course if the residents could costlessly bargain with the factory, there would have been no need for a lawsuit and an award of permanent damages in the first place.

260. See supra note 118 and accompanying text (discussing single-owner approach).

stopping the grant of a variance means purchasing the property in question, does something very much like this.[261] Consistent with the Coasean idea of reciprocal harm,[262] the objecting neighbor is required to absorb the negative impact that her demands have on the value of the nearby property—the opportunity cost of keeping the land in its current use.[263]

If forced purchases sound like extreme overkill in managing spillovers and a radical departure from current practices, consider the fact that zoning laws routinely do something very similar. People are not allowed to acquire and use property interests of any size and shape whatever. While concerns about later reconfiguration costs represent one rationale, a more basic one is that too-small holdings produce a profusion of boundary lines and hence more spillovers that must be managed at positive cost.[264] Indeed, Peter Colwell has observed that governmentally imposed land use restrictions could be jettisoned altogether if holdings were required to be large enough (he gives the example of 640 acres) and edges were subject to certain requirements (such as "very tall berms").[265]

There are countervailing considerations, of course. As Yoram Barzel has observed, there are disadvantages of consolidating ownership in one person or entity, including scale mismatches between labor and nonlabor inputs and specialization losses.[266] Yet zoning operates prophylactically to mandate minimum bundles for all (even if they are orders of magnitude smaller than in Colwell's thought experiment). Because forcings could operate more selectively where spillovers have actually shown themselves

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261. Ownership is not actually forced on the neighbor under New Jersey's conditional-variance model; rather, her ability to defeat the variance depends on her willingness to buy the property. See supra note 22 and accompanying text.

262. Coase, supra note 233, at 2.

263. A related idea would be to permit parties burdened by servitudes to force ownership of their parcels onto the dominant estate owner under specified circumstances. An intriguing example of this approach is found in Italian law. Codice Civile [C.c.] art. 1070 (It.), translated in 3 The Italian Civil Code and Complementary Legislation 232 (Mario Beltramo et al. trans., 2007) (providing that owner of servient estate who finds himself under unwanted obligations such as maintaining an easement "can always free himself by renouncing ownership of the servient land in favor of the owner of the dominant land").

264. Similar points can be made about irregularly shaped parcels. See Gary D. Libecap & Dean Lueck, The Demarcation of Land and the Role of Coordinating Property Institutions, 119 J. Pol. Econ. 426, 450–53 (2011) (finding in empirical study in central Ohio that irregular parcels demarcated by metes-and-bounds system generated more property disputes than otherwise similar property demarcated by rectangular system). The rectangular system of demarcation effectively forces ownership of those portions of the land contained in the rectangular footprint that the landowner would have preferred not to include in her holding. See id. at 427–28 (explaining how preset size, shape, and alignment mandated by rectangular system reduces flexibility to achieve standardization).

265. Peter F. Colwell, Tender Mercies: Efficient and Equitable Land Use Change, 25 Real Est. Econ. 525, 529 n.6 (1997).

266. Barzel, supra note 92, at 51–52 (detailing "costs of sole ownership").

to be troublesome, they would not necessarily increase average parcel size and could indeed diminish the incidence of unwanted ownership of excess land.

4. *Addressing Territoriality.* — A forcings model might also be used to align ownership bundles with observed patterns of territorial behavior. Consider the phenomenon of homeowners claiming exclusive rights in the street parking spots that their homes front upon.[267] Allowing private parties to assert exclusive control over public parking spaces is problematic because it impedes the efficient rotation of cars in and out of spaces over the course of a day or week.[268] One prescription is to deny private claims over the spaces to ensure that they remain in the commons.

The analysis here suggests another alternative that builds on rather than fights owners' territorial impulses.[269] The adjacent landowners could be required to purchase rights to the parking spaces that front their homes or businesses, and then be allowed to market those rights (either directly, or through services that emerge to handle such transactions) in exchange for micropayments from parkers.[270] Such exchanges have become feasible at low cost due to the ubiquity of smartphones that can be equipped with parking apps.[271] If it becomes possible for would-be

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267. A particularly intense (albeit episodic) subspecies of the problem is found in the "dibs barriers" that Chicagoans use to mark claims over spaces that they have dug out of the snow. See, e.g., Richard A. Epstein, Allocation of the Commons: Parking on Public Roads, 31 J. Legal Stud. S515, S528–33 (2002).

268. See id. at S527 (noting impact on road's "carrying capacity" of granting permanent rights in parking spaces).

269. A similarly motivated approach appears in Donald Shoup, The High Cost of Free Parking (2005). As Shoup explains, "Many residents seem to think they own the parking spaces in front of their homes, or at least they act that way. So rather than fighting this thought, cities can accept it and take advantage of it by treating residents like the landlords they think they are." Id. at 434.

270. If individual ownership of parking rights proved too difficult to implement, collective ownership of the parking rights by a group of adjacent residents is another possible approach. See, e.g., id. at 434–53 (proposing "parking benefit districts" that would grant residents free parking in their neighborhoods but would charge nonresidents to park and would earmark resulting revenue for use within district); see also George W. Liebmann, The Little Platoons: Sub-Local Governments in Modern History 58 (1995) (describing approach used in St. Louis County in which "title to the bed of a street is deeded to the residents adjacent to it, subject to assessments enforceable by lien," with streets then managed by trustees elected by owners' association).

271. The recently developed MonkeyParking app, although currently disabled following a cease-and-desist letter from the San Francisco City Attorney, illustrates the technical capacity to use app-enabled smartphones to transact over parking in real time. See Kate Conger, MonkeyParking App Shuts Down Under Pressure from City Attorney, S.F. Examiner (July 10, 2014), http://www.sfexaminer.com/sanfrancisco/monkeyparking-app-shuts-down-under-pressure-from-city-attorney/Content?oid=2846688 (on file with the *Columbia Law Review*) (describing app, which enabled drivers vacating street parking spaces in San Francisco to auction access to those spots to other drivers, and reporting on MonkeyParking's decision to suspend service); see also Press Release, Office of the City Att'y, City & Cnty. of S.F., Herrera Tells Monkey Parking to Drop Mobile App for Auctioning City Parking Spots (June 23, 2014), http://www.sfcityattorney.org/index.aspx?

parkers to quickly learn about available spaces and pay to occupy them, the landowners would be confronted with the opportunity cost of keeping spaces permanently out of circulation. While some might choose to bear the expense, most presumably would not.[272]

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All of these ideas suggest that forcings are most plausible in instances where there is a particular owner who, because of her other holdings (or proposed other holdings), is especially well positioned to also own the properties in question.[273] Contrast with this model the idea of turning ownership of unwanted parcels into a randomly imposed civic burden, like the military draft or jury duty.[274] To make such an idea minimally workable, it would be necessary to carefully define the eligible pool and place restrictions on reconveyance.[275] However, a lottery among subsidized (and prescreened) volunteers or an auction designed to find the eligible person who will accept the property at the lowest negative price would likely be more attractive alternatives. Unless there is some civic value generated by the random assignment itself, or the random assignment is simply much cheaper to operate,[276] mechanisms facilitating voluntary transfers appear preferable.

B. *Toward a Forcings Doctrine*

The discussion to this point has established that forced ownership tends to be most plausible in settings where the owner has already voluntarily undertaken ownership (or some other possessory action) with

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page=599 (on file with the *Columbia Law Review*) (describing cease-and-desist letter alleging that app violates city code prohibiting transactions over public on-street parking).

272. Cf. Shoup, supra note 269, at 434–40 (predicting "parking benefit districts" that earmark nonresident parking payments for district services would generate political support for pricing that allows curb space to be well utilized throughout the day, while retaining vacancy rates sufficient for resident parking).

273. Cf. Merrill, Accession, supra note 19, at 488–91 (describing accession as way of identifying fit owner).

274. See, e.g., Jon Elster, Solomonic Judgements 53–78 (1989) (discussing use of randomization strategies to allocate goods and bads).

275. For example, perhaps only residents within a certain radius of the subject property would be included. Screens based on income and credit history (or willingness to post a bond) could be applied to ensure that the person would be in a position to bear the obligations of ownership, and hardship exemptions could be made available to those who lacked sufficient time or liquidity to manage the property. Restrictions on reconveyance would be necessary to ensure that the goals of the program would not be undone through reconveyance to, say, a judgment-proof individual.

276. One reason it could be cheaper to operate relates to adverse selection. People who take on ownership burdens for pay may be willing to do so for less money if they know they have a greater capacity to dodge the obligations of ownership (if, for example, they are judgment-proof or impervious to reputational sanctions). This possibility puts more pressure on the screening mechanisms than in a purely volunteer or randomized system.

regard to a connected or complementary interest. This is because coercion will only dominate other alternatives (such as an auction) where a particular party is the sole logical choice to take on ownership of a particular property, effectively giving her monopoly leverage over the purchase decision. The typical source of that leverage will be a party's existing holdings or possessory interests. The question then becomes whether requiring ownership of this additional interest is a type of burden for which compensation is due, or whether it should be understood as a normatively appropriate uncompensated adjunct to the voluntary ownership interest.

Evaluating the burdens associated with forced ownership raises questions that are familiar from regulatory takings doctrine, though not easily resolved. What kinds of background conditions are (or should be) understood to inherently condition title?[277] How much should it matter if one had notice of an unwanted restriction before one acted or invested?[278] Which economic burdens and thwarted expectations must be borne without payment?[279] When is an owner being required to confer benefits on society, the costs of which should be spread more broadly?[280] All of the difficulties and unanswered questions that plague takings law find counterparts in forcings analysis.[281] An initial question, however, is whether the Takings Clause is even the right doctrinal focus for forcings analysis.

1. *Are Forcings Takings?* — Recognizing the commonalities between forcings and takings might suggest that forcings can be comfortably

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277. See Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992) (requiring compensation when government action deprives property of all economically viable use, except where limitation "inhere[s] in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership").

278. See Palazzolo v. Rhode Island, 533 U.S. 606, 626–30 (2001) (holding that ownership change following regulation does not bar takings claim).

279. See Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) (setting forth factors to determine whether taking has occurred, including "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct, investment backed expectations," and "the character of the government action").

280. See, e.g., Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 537 (2005) (noting Court has "emphasized [the Takings Clause's] role in 'bar[ring] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole'" (second alteration in original) (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960))).

281. For example, the possibility that courts as well as the political branches can engage in takings raises the question of whether a corresponding doctrine of judicial forcings should be developed. See Stop the Beach Renourishment v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592, 2602 (2010) (plurality opinion) ("If a legislature *or a court* declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation.").

folded into existing takings law. To some extent this is true. As a matter of constitutional doctrine, the Takings Clause is probably the right place to locate the analysis of burdens associated with property ownership—including the burden of additional or prolonged property ownership. Indeed, the forced ownership of a property interest that is complementary to or otherwise related to something one previously voluntarily acquired can be characterized as a reduction in the value of that other voluntarily owned interest. On this account, the forced ownership of a related or complementary property interest is like any other aversive strand that law might place in the property bundle, such as a restriction on the way in which land can be used.[282] This does not mean a given forcing will necessarily count as a compensable taking, but it does make the Takings Clause a comfortable fit for assessing whether such a compensable event has occurred.

The analysis becomes trickier when the precondition for unwanted ownership is not another form of ownership, but rather some other activity, such as conversion. In these cases, it is hard to identify any property interest that has been compromised, since the triggering condition is tortious behavior and ownership first appears as a penalty. However, remedies like trover could actually be characterized as involving ownership interests through something like a doctrine of relation back. Having broken the thing, it is as if one acquired it before the breakage happened. One is made retroactively responsible in a way that is indistinguishable from having been the thing's owner at the moment one first laid hands on it. It is this earlier proto-ownership relationship that is altered as a result of the remedial regime. Nonetheless, it is questionable whether the Takings Clause can be stretched to reach this case.

In a broad sense, the Takings Clause could be viewed as a countermajoritarian check against burdensome governmental interferences with one's chosen property arrangements, whether those arrangements involve ownership or nonownership. Doctrinally, however, forcings that are not linked to voluntary property ownership sit uncomfortably in the takings framework. Moreover, because these forcings tend to be remedial in nature, the Due Process Clause would offer a more natural analytic hook for assessing their constitutionality. Because of their remedial flavor, accompanying them with compensation would make little sense; they must instead stand or fall on the basis of their ability to remedy a wrong. Either such forcings are legitimate governmental acts that require no compensation, or they are illegitimate governmental acts that are forbidden outright.

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282. Indeed, some takings challenges involve use limits that could be recast in the language of forced retention. See, e.g., Pa. Coal Co. v. Mahon, 260 U.S. 393, 412–16 (1922) (finding taking where law required coal company to keep specified amount of coal in place to prevent subsidence); supra note 59 and accompanying text (discussing rent stabilization law that constrained ability to change land use). Thanks to an anonymous reviewer for comments on this point.

Importantly, the Takings Clause presupposes legitimate action that requires for its validation only the payment of just compensation.[283] The Due Process Clause and other constitutional provisions guard against illegitimate government conduct that cannot be validated through payment.[284] To the extent that forcings interfere with liberty interests or violate other constitutional provisions, they could not be legitimated through the payment of compensation. The idea of compensated forcings presupposes, however, that there are some forms of forced ownership that are legitimate if (and only if) they are compensated. The idea is intuitive: The normative justifications for imposing ownership cannot always be expected to line up with situations in which the *distributive* consequences of forced ownership are justified. But as a doctrinal matter, there is room for debate about the extent, and even the existence, of a zone in which forcings are both permissible and compensable.

2. *When Are Forcings Compensable Events?* — In deciding whether a permissible forcing requires compensation, the correct normative analysis would have much in common with takings analysis insofar as it involves a search for baselines, an analysis of deviations from those baselines, and consideration of the extent to which investment-backed expectations have been undermined. When is *ownership itself* the sort of burden or surprise or burdensome surprise that makes its uncompensated imposition normatively problematic? These inquiries always threaten to turn circular in the takings context, and the same is true when it comes to forcings.

To structure the inquiry, it is helpful to go back to the question of bundling and consider whether the unwanted ownership interest helps to internalize costs that the owner has otherwise inflicted or instead offloads costs onto the owner. Is the law merely squaring things up so that the owner shoulders burdens commensurate with her own operations in the world, or has it slipped into the owner's domain an extra burden that the owner should not by rights have to bear? In the first case, forced ownership removes a distortion so that ownership's built-in incentive structure can operate unimpeded. In the second case, ownership is imposed to glean some set of societal benefits that the owner has no duty to provide. This need not mean that the forcing is normatively off limits. Perhaps the benefits it would provide cannot be acquired at all, or cannot be acquired as cost effectively, through mere monetary obligations. If

283. See *Lingle*, 544 U.S. at 543 (explaining that Takings Clause "does not bar government from interfering with property rights, but rather requires compensation" where such interferences are otherwise valid).

284. See id. (observing "no amount of compensation can authorize" an impermissible governmental act, such as one that violates due process).

the forcing is cost justified but the *burden* it imposes is not distributively justified, compensation might be used in conjunction with coercion.[285]

This normative bifurcation tracks that in the takings arena. In that context, instead of coercively imposing or augmenting ownership, the government is coercively taking away ownership, or whittling it down.[286] Because "takings" is a constitutional term of art that implies mandatory compensation, takings must always be compensated. However, many governmental acts affecting property rights do not require compensation, either because they do not go "too far"[287] or because they are categorically exempt from takings analysis.[288] Some incursions into property rights are deemed normatively appropriate without compensation because they address impacts that the owner never had any right to impose. The so-called nuisance exception to the Takings Clause is the clearest example of the "background principles" that condition title.[289] Someone whose use of land generates serious negative externalities can be shut down without compensation, even at great economic loss.[290]

In other cases, however, the individual has a clear normative right to the property interest in question, but her continued ownership imposes social costs that make it efficient for the state to end it through a taking. For example, a landowner's property may stand in the way of the only viable path for a highway or rail line that would add enormous social value. If the constitutional requirement of public use is met, the taking can proceed, but just compensation is required. The forcings analogue might be a situation in which the owner's voluntary holdings are harmless in themselves but leave behind some adjacent area that cannot be usefully managed by any other owner. Before concluding that forcing

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285. This assumes that other normative hurdles are cleared, and that it is possible to compensate for the losses in question. See infra text accompanying notes 307–309 (discussing potentially noncompensable autonomy concerns).

286. Thus, where forcings can be recast as mandatory bundling, takings can be recast as mandatory unbundling. When property is taken through eminent domain, ownership tomorrow is unbundled from ownership yesterday; the unified fee simple package is coercively split. Lesser incursions into property rights may remove certain prerogatives of ownership or physically commandeer certain pieces of a given parcel.

287. *Mahon*, 260 U.S. at 415 (Holmes, J.) ("[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."). In most circumstances, the applicable test for determining whether a compensable regulatory taking has occurred is the one laid out in Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978). See *Lingle*, 544 U.S. at 538–39 (quoting *Penn Central* and reiterating primacy of its multifactor test).

288. See, e.g., David A. Dana & Thomas W. Merrill, Property: Takings 110–20 (2002) (describing categories of governmental action exempted from Takings Clause scrutiny).

289. See Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029–30 (1992) (identifying nuisance abatement as "background principle" that conditions title and holding nuisance control measures will not constitute compensable takings even when all economically viable use is eliminated).

290. See, e.g., Hadacheck v. Sebastian, 239 U.S. 394, 410–14 (1915) (holding Los Angeles could shut down brickworks without compensation).

such ownership is a compensable event, however, it is necessary to consider the extent to which the bundling of interests was part of the original bargain that the owner made.

Where new or continuing ownership obligations are known to attach in a categorical way to other or earlier ownership choices, the added ownership burden is not a surprise and arguably does not interfere with any reasonable investment-backed expectations.[291] On the contrary, the bundling of later ownership obligations with earlier choices may be crucial to generating proper upstream incentives. Significantly, one can reject the package by never becoming an owner in the first place.[292] Where ownership obligations attach to nonownership conduct (such as tortious behavior), rejection of the package may take the form of changes in primary behavior. Thus, for example, people may interact less with the chattels of others if they run the risk of being forced to purchase anything that they damage.[293]

In some cases, these avoidance behaviors may be socially valuable. Indeed, they may be the entire point of the bundling exercise in question. For example, Ian Ayres has suggested that put options could provide valuable deterrence where they are granted to victims upon the invasion of their property interests.[294] Similarly, making property interests harder to alienate makes them less attractive to those who would acquire them only to gain bargaining leverage over another party.[295] Scholars have also suggested that prohibitions on abandonment may generate socially valuable decisions about entering into and carrying on ownership.[296] For example, an owner might be more reluctant to dump

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291. Cf. Palazzolo v. Rhode Island, 533 U.S. 606, 632–36 (O'Connor, J., concurring) (suggesting landowner's post-restriction acquisition could factor into analysis of investment-backed expectations in takings claim). But cf. id. at 636–37 (Scalia, J., concurring) (disagreeing with Justice O'Connor's analysis and opining that timing of acquisition relative to restriction "should have no bearing" on takings analysis where "'background principles'" like nuisance are not involved (quoting *Lucas*, 505 U.S. at 1029)).

292. Obviously, would-be owners are unlikely to swear off ownership altogether in response to a given aversive bundle; rather, they will attempt to find bundles that have acceptable expected values and risks. See Strahilevitz, Right to Abandon, supra note 7, at 400–02 (suggesting limits on abandonment may lead to less risk taking in initial acquisition decisions).

293. See Epstein, Protecting Property, supra note 19, at 850 (suggesting forced-purchase remedy would overdeter innocent converters).

294. See Ayres, supra note 6, at 34–36 (discussing this deterrence function, while noting risk of overdeterrence if strike price is not set appropriately).

295. See, e.g., Ian Ayres & Kristin Madison, Threatening Inefficient Performance of Injunctions and Contracts, 148 U. Pa. L. Rev. 45, 71–78 (1999) (examining inalienability as means to control strategic wielding of legal rights); Fennell, Alienability, supra note 9, at 1429–42 (explaining how inalienability could address strategic dilemmas by dampening incentives to acquire entitlements).

296. See Strahilevitz, Right to Abandon, supra note 7, at 400 ("[A] regime that prevents individuals from abandoning real property might encourage them to use the

waste on her land if she knew she could not abandon and move on when the accumulation of discarded material causes the property to turn negative in value.[297] Equally important, a would-be owner bent on such behavior might decide not to become an owner at all if she knew abandonment would be impossible.

To be sure, it is far from clear that bundling of ownership interests reliably creates this kind of positive pressure on upstream decisionmaking. For example, the inability to end an ownership relationship on one's own initiative could actually produce harmful selection effects ex ante—owners who self-select not for their willingness to accept costs associated with unwanted retention, but rather for their ability to offload the bulk of those costs on society.[298] But to the extent that bundling of ownership interests is designed to put pressure on earlier acquisition decisions, compensating for the forced element would undo that pressure. One way to express this point doctrinally is to say that the voluntarily acquired property interest is already conditioned by the possibility of the later involuntary interest, so that the value of the former is not diminished by any burdens that the latter might impose. The involuntary ownership interest is, on this account, just another incident of ownership.

There is a risk of tautology here. If unwanted ownership obligations that follow voluntary acquisition of some other property interest can always be interpreted as incidents of that initial ownership relationship, there would seem to be no logical limit to the types of unwanted ownership that the government could tack onto landowners' existing holdings without compensation. A parallel concern in the regulatory takings arena led the Court to reject the idea that all regulations existing at the time a landowner acquired the property automatically become background limitations on title that could not be challenged as takings.[299] Some principle external to the government's choice to impose a burden is necessary to define the sorts of burdens that owners will be understood to have signed on to accept.

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property in a more sustainable way."); see also Peñalver, Illusory Right, supra note 7, at 214 ("The common law's distrust of abandonment seems less alien and arbitrary if we approach it from the perspective of a community in which things are acquired, not in anticipation of quickly throwing them away, but to be kept and (re)used, or perhaps resold or given away.").

297. See, e.g., Strahilevitz, Right to Abandon, supra note 7, at 401 ("Were it to prohibit abandonment, the law might encourage land owners to evaluate their own practices with a longer time horizon in mind, shifting strategies from slash-and-burn to techniques more in line with maximizing the long term value of the property.").

298. For example, a judgment-proof owner who flees the premises when the property value turns negative (and who is also invulnerable to reputational pressures to take responsibility for it) probably cannot be made to bear the costs of her earlier bad decisions with respect to the property. See id. (noting sale to judgment-proof buyer could thwart ban on abandonment).

299. See Palazzolo v. Rhode Island, 533 U.S. 606, 627 (2001) ("[Some] enactments are unreasonable and do not become less so through passage of time or title.").

In the forcings context, examining the nature of the existing and new property interests to determine whether the two plausibly fit together to internalize costs offers one possible limiting principle. Another possibility would be to consider whether the added, involuntary property interest is one that usually delivers positive value and is conferred in a blanket manner on all owners of the predicate interest. If it is merely a matter of luck whether, say, a baby animal in a given case happens to have negative rather than positive value for the owner of the animal's mother, there is less concern about owners being singled out for burdensome treatment.[300] The blanket application of the rule would also provide a firmer basis for establishing owners' expectations than would ad hoc impositions of new ownership burdens.

By contrast, consider a new ownership burden that is imposed not simply as a matter of course, but rather because one's existing property holdings have combined with a set of emerging circumstances to produce a situation in which one's ownership of the new interest would be socially desirable. Examples might include land assembly or development contexts in which it is socially valuable for a given owner to accept responsibility for a larger set of parcels than she would prefer—where doing so is not designed to internalize nuisance-like externalities of development and goes beyond what existing development rules have required of other owners. Smaller-scale examples might include requiring neighbors to take possession of stray bits of adjacent land that cannot be reasonably put to use by others. It is of course possible to take issue with these particular examples, but the point is simply that circumstances may exist in which the economic burden of a forcing lacks normative justification, but the forcing itself would add social value. These are circumstances in which a compensated forcing might be considered.

3. *Compensation.* — If just compensation were required for a forcing, what would it look like? A likely starting point is fair market value, the constitutional touchstone for eminent domain.[301] In the case of condemnation, the government exercises a call option; it pays out money and receives property. In a forcing, by contrast, property moves from the government to the private landowner—a governmental exercise of a put option. The amount of money that changes hands, and the direction in which the money flows, depends on the strike price for that put option. If the property's fair market value is positive, this would seem to call for the government to collect money, not pay it out—although an offset of some sort might remain appropriate in light of the forced nature of the transfer. It is also entirely possible for property to carry a negative fair market value, depending on the obligations that go with the ownership

300. See Saul Levmore, Takings, Torts, and Special Interests, 77 Va. L. Rev. 1333, 1344–48 (1991) (noting concerns about "singling out" in takings context).

301. See, e.g., United States v. 564.54 Acres of Land, 441 U.S. 506, 511 (1979) ("The Court . . . has employed the concept of fair market value to determine the condemnee's loss").

interest in question. Thus, the strike price for the governmental exercise of a put option might be either positive or negative.[302] Typically, though, at least some of the compensation due would be provided in kind through the ownership interest itself.

Eminent domain is controversial in significant part because of factors for which the government's just compensation measure does not adequately compensate.[303] Mirror-image concerns arise in the case of forcings. First, there is the question of how and whether subjective valuations should play into compensation. In place of the positive subjective premium typically attributed to existing owners, there is a presumptive subjective deficit associated with forced ownership. Just as we can assume most condemnees have valuations above fair market value (given that they have not already sold),[304] we can assume that most forced purchasers have valuations below fair market value (given that they have not already bought).

Second, whereas condemnees are deprived of opportunities to realize gains that exceed the expected returns built into fair market value, forced purchasers are made to bear the risk of loss to the extent ownership assigns them actual outcomes.[305] Thus takings swap an expected value (derived through fair market value) for an actual outcome, while forcings do the opposite. If people are risk averse, there would be an asymmetry between the two situations.[306] While just compensation (as currently constitutionally defined) does not give risk-preferring condemnees anything for losing out on the chance to experience variable outcomes, there may be a stronger case for compensating forced owners for bearing the risk of variable outcomes, rather than simply pegging compensation to the expected values

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302. A negative strike price would mean that the holder of the option (here, the government) could force ownership on an individual, but would have to pay the individual. Viewed from another angle, the government in this scenario might be said to hold a call option that enables it to pay a positive price to engage in an activity that imposes costs: the offloading of ownership. Nothing turns on which term is used. Because puts usually involve forcing ownership onto another party, that terminology is used here.

303. See, e.g., Dukeminier et al., supra note 14, at 1077 (suggesting level of compensation at least partially explains why property owners are concerned about scope of "public use").

304. See, e.g., James E. Krier & Christopher Serkin, Public Ruses, 2004 Mich. St. L. Rev. 859, 866 (positing that landowners subject to eminent domain hold positive consumer surplus in their properties "for otherwise owners would already have sold their holdings on the market").

305. It is also true that condemnees may be saved from experiencing actual losses, and that forced purchasers may experience actual gains. The text focuses on the aversive side of the compelled change in ownership.

306. A person is risk averse if she prefers a set of outcomes with lower variance over one with higher variance, despite equivalent expected values. See, e.g., Jonathan Baron, Thinking and Deciding 516 (4th ed. 2008) (observing that losing $100,000 likely generates more than 100 times more disutility than losing $1,000, given diminishing marginal utility of money).

embedded in fair market value. The analysis might depend in part on whether forcings are applied to individuals, who are likely to be risk averse, or to large commercial entities that are likely to be risk neutral.

Third, as already noted, there is an autonomy or dignitary interest that is implicated to the extent that ownership affects one's self-definition.[307] This consideration is the trickiest to address, just as in the case of eminent domain, because it is not truly amenable to monetary compensation. In the forcings context, autonomy concerns might be addressed either by allowing an escape hatch,[308] or by limiting the uses of forcings to contexts where autonomy concerns are unlikely to be implicated. Here, it would be fruitful to consider differences with respect to autonomy among types of owners and types of property. Imposing ownership on large corporations might present fewer autonomy concerns than imposing ownership on individuals, and fungible property interests might present fewer autonomy concerns than properties of a more personal nature.[309]

C. *From Forcings to Relievings*

While it is interesting to examine ways in which forcings might be extended, it is equally important to consider whether some existing forcings are not really justified, or should be augmented by relievings.

1. *Rethinking Existing Forcings.* — There is no reason for burdens to be imposed in the form of ownership if ownership itself does not produce advantages. In considering the advantages of ownership, this Article has focused primarily on the ability of possessory ownership to deliver actual outcomes going forward. However, sometimes the advantages that ownership produces are not of this nature; they instead involve economizing on information costs about past and present events.

Consider again the remedies of accession and trover.[310] Here, the reason for assigning ownership may simply be to save society the costs of figuring out damages. Yet it is quite possible that society could readily put a figure to *the costs* of calculating damages. An actor who is willing to bear those calculation costs (as well as the costs of the damages themselves, once calculated) could be relieved of ownership without imposing any costs on society as a whole. Similarly, abandonment may be primarily socially costly because it creates confusion or involves the offloading of land that has already been damaged in some way. If these costs could be covered, as through a bonding mechanism, ending ownership would not

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307. See supra text accompanying notes 75–79 (noting personhood concerns).

308. See infra Part V.C.2 (discussing relievings).

309. See Margaret Jane Radin, Property and Personhood, 34 Stan. L. Rev. 957, 986–88 (1982) (distinguishing property that is personal in nature from that which is fungible). Thanks to Eduardo Peñalver for comments on this point.

310. See supra notes 16, 19 and accompanying text (discussing these remedies).

inflict social costs. These observations suggest the utility of the converse of forcings, relievings.

2. *Relievings.* — Forcings presuppose a situation in which ownership is socially valuable but privately burdensome. Yet many situations in which ownership is compelled actually involve social as well as private costs. Offering a way out of ownership holds social value to the extent it relieves those who are ill suited to bear the associated risks or make the necessary decisions. If ending ownership would be a Pareto improvement, why does it not happen? To observe that there is currently no established mechanism through which unwilling owners can be readily relieved of ownership only begs the question.

The law does at times exhibit a sensitivity to the costs of ownership and the realities of being forced to continue bearing its burdens. For example, *In re Pratt*, a First Circuit case, involved a Chevy Cavalier financed by General Motors Acceptance Corporation (GMAC) that GMAC refused to repossess after a debtor in bankruptcy surrendered it.[311] No junkyard would accept the now-worthless car without a lien release from GMAC, but GMAC would not release the lien.[312] The owners, the court found, "were confronted with the grim prospect of retaining indefinite possession of a worthless vehicle unless they paid the GMAC loan balance, together with all the attendant costs of possessing, maintaining, insuring, and/or garaging the vehicle."[313] It held that GMAC's actions, even if permitted under state law, were "coercive" in effect and thus in contravention of the discharge injunction under bankruptcy law.[314]

What the court did in *Pratt* amounted to a relieving, though it was not given that name. But relievings are relatively uncommon. Why? Clearly there are costs associated with providing relief from ownership. Beyond administrative costs, such a system would potentially saddle government with ownership it does not want, or with the costs of inducing (or forcing) another party to take up ownership. But suppose some relievings would produce net gains, despite their costs. The problem may be that it is deemed normatively inappropriate for society to bear the costs associated with the relieving—both the costs of administering the system, and the costs that ending ownership will impose, including

311. 462 F.3d 14, 15–16 (1st Cir. 2006).

312. Id.

313. Id. at 20.

314. Id. at 19–20. Underwater homes on which lenders have refused to foreclose can present similar conundrums. See supra notes 50–53 and accompanying text (discussing unwanted retention in defaulting mortgagor context). Compare In re Pigg, 453 B.R. 728 (Bankr. M.D. Tenn. 2011) (ordering sale where debtor had surrendered property following flood but mortgagee would not foreclose or accept deed in lieu of foreclosure), with In re Fristoe, No. 10-32887, 2012 WL 4483891, at *4 (D. Utah Sept. 27, 2012) (disagreeing with reasoning in *Pigg* and finding bankruptcy court lacked power to order sale without lender's consent).

heightened information costs, the costs of retransferring the property, and so on.

This is where the idea of chargeable relievings comes in. Just as there may be cases where the social value of ownership does not line up with the distributive fairness of imposing ownership's burdens, there may be cases where the social costs of ending ownership do not line up with the distributive fairness of relieving the owner of the related burdens. Compensated forcings on the one hand and chargeable relievings on the other can accommodate these misalignments. On reflection, the idea of a chargeable relieving is not odd at all. Relievings amount to put options against the government; decisions about the charges that will accompany them simply amount to selecting the strike price.

Put options against the government have been offered in relatively limited situations, such as the buyback of guns,[315] gas-guzzling "clunkers,"[316] and fishing boats.[317] But they might be offered more broadly.[318] As already suggested, one especially promising application would enable would-be abandoners to rid themselves of their property in an orderly manner by paying the costs that their termination of ownership imposes.[319] Similarly, a tortfeasor subject to trover could be allowed to avoid forced ownership by paying the costs of appraising the damage. Such an approach would allow a party to transform her position from outcome-bearer to damage-payer. Thus, relievings can often constitute a complementary strategy to—or an escape hatch from—forcings.

CONCLUSION

Government coercion can be used to impose or prolong private ownership, just as it can be used to cut it short. Yet forcings are a form of government compulsion that has not been systematically explored, despite the evident connections to existing bodies of literature. One might contend that this neglect is appropriate because the real-world domain of forcings is likely to be limited or nonexistent for normative or practical reasons. But that claim cannot be evaluated until we recognize the category itself. Doing so directs attention to existing forms of forced

315. See Morris, supra note 6, at 854–55 (discussing gun buybacks as examples of put options).

316. See generally Atif R. Mian & Amir Sufi, The Effects of Fiscal Stimulus: Evidence from the 2009 "Cash for Clunkers" Program, 127 Q.J. Econ. 1107 (2013) (studying impact of 2009 "Cash for Clunkers" program that enabled U.S. motorists to turn in fuel-inefficient cars for destruction in exchange for credit against certain new vehicle purchases).

317. See, e.g., L.S. Parsons, Management of Marine Fisheries in Canada 191–92 (1993) (assessing fishing license buyback programs).

318. See, e.g., Fennell, Alienability, supra note 9, at 1457–59 (discussing use of put options in conjunction with alienability limits).

319. See generally Strahilevitz, Right to Abandon, supra note 7 (examining costs of abandonment and exploring ways to address them).

or pressured ownership, and prompts exploration of the reasons behind them and the limits on them.

Recognizing forcings as a category focuses new attention on how ownership, as a mechanism for assigning actual rather than expected outcomes, can hold social value even when it proves privately burdensome. The ability to save on information costs, to allocate risk, and to align incentives may motivate choices to compel ownership over the objections of the owner herself. Of course, forced ownership will rarely be the best answer; there are typically other alternatives that can serve the relevant social purposes at lower cost. Isolating the conditions that could call for the imposition of ownership shows not only how forcings might be extended but also where existing forms of involuntary ownership might be replaced with less coercive alternatives. Finding the niche that forcings occupy on the slate of policy alternatives also illuminates another unappreciated domain for governmental action—that of relieving owners of burdensome ownership.